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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 378

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO PORTRAIT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36192)

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO PORTRAIT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 21396

CHICAGO PORTRAIT COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For petitioner, Arnold R. Baar, Esq.; Herman T. Reiling, Esq.; Ernest H. Emery, Esq.; Edgar H. Walker, Esq.; withdrawn, Frederick C. Laird, Esq. For respondent, A. H. Murray, Esq.

Docket entries

1926:

Nov. 20—Petition received and filed. Taxpayer notified.

Nov. 21—Copy of petition served on general counsel.

1927:

Jan. 19—Answer filed by general counsel.

Feb. 12—Copy of answer served on taxpayer. Assigned to general calendar.

Mar. 17—Notice of appearance of Frederick C. Laird as counsel for taxpayer, and request that case be placed on Chicago circuit calendar, filed.

Mar. 23—Order to place proceeding on circuit calendar for hearing signed and filed. Both sides notified.

1929:

Jan. 31—Hearing set. Calendar called March 18, 1929, Chicago, Illinois.

Feb. 6.—Notice of withdrawal of Frederick C. Laird as counsel for taxpayer filed.

Feb. 6.—Notice of appearance of Ernest H. Emery as counsel for taxpayer filed.

Mar. 20—Stipulation of facts filed in field.

Mar. 20—Motion to file amended petition filed by taxpayer. Granted 10 days to file.

Mar. 25—Amended petition filed.

Mar. 20—Hearing had before Mr. Siefkin. Submitted; petitioner to amend petition. Granted briefs due June 1, 1929.

Mar. 27—Copy of amended petition served on general counsel.

2 Apr. 10—Answer to amended petition filed by general counsel.

Apr. 25—Brief filed by general counsel.

May 23—Brief filed by taxpayer.

June 24—Findings of fact and opinion rendered; Forest D. Siefkin, Division 16. Judgment will be entered under rule 50.

Aug. 17—Notice of settlement filed by general counsel.

Aug. 20—Hearing set Sept. 11, 1929, on settlement.

1929:

Aug. 24—Consent to settlement filed by taxpayer.

Sept. 5—Decision entered; Benj. H. Littleton, division 4.

1930:

Feb. 4—Petition for review to U. S. Circuit Court of Appeals, 7th Circuit, with assignments of error filed by general counsel.

Feb. 25—Proof of service filed (taxpayer).

Feb. 25—Proof of service filed (attorney).

Mar. 24—Notice of appearance of Arnold R. Baar and Herman T. Reiling as counsel for taxpayer filed.

Apr. 10—Motion for extension to June 16, 1930, to settle and transmit record filed by general counsel.

Apr. 11—Order enlarging time to June 16, 1930, for preparation of evidence and delivery of record entered.

June 16—Motion for extension to Aug. 15, 1930, to settle and transmit record filed by general counsel.

June 16—Order enlarging time to Aug. 15, 1930, for preparation of evidence and delivery of record entered.

Aug. 4—Præcipe filed; proof of service thereon.

Now, Aug. 13, 1930, the foregoing docket entries certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

3 Before U. S. Board of Tax Appeals

Petition

Filed Nov. 20, 1926

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:Ad-60-D-WLC.) dated September 21, 1926, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with principal office at 509 South Wabash Avenue, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and mailed "Exhibit A") was mailed to the petitioner on September 21, 1926.

3. The taxes in controversy are income taxes for the calendar year 1923 and for $1,919.59.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The commissioner has disallowed as a credit against the petitioner's income tax for the calendar year 1923 the amount of income taxes paid to foreign countries. In revenue agent's report dated March 23, 1926, upon which the commissioner's determination is based, it is stated that—

"Any income, war-profits or excess-profits taxes paid to the Commonwealth of Australia, under the laws of the Commonwealth of

Australia, as indicated under article 612 of regulations 62, would be allowed as a credit, and if the taxpayer will submit proof of such taxes being paid and all other necessary data as to how the amount claimed as a deduction is arrived at, etc., same should be given consideration."

Before the necessary proofs could be secured from Australia a sixty-day letter was sent to the petitioner by the commissioner.

(b) The commissioner has failed to take into consideration income taxes paid by the petitioner's foreign subsidiary, of which petitioner owns a majority of the stock, to the Dominion of New Zealand as a credit against petitioner's tax liability for 1923.

(c) The commissioner erred in relying upon S. M. 1614, Cumulative Bulletin III–1, page 227, which, petitioner contends, is an
4 erroneous interpretation of the meaning of the term "foreign countries" as used in section 238 (a) of the revenue act of 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) That the petitioner received dividends in the amount of £4,047.80 during the calendar year 1923 from the International Art Company, Ltd., Sydney, Australia, upon which income taxes had been paid to the following foreign countries:

Commonwealth of Australia.
New South Wales.
Dominion of New Zealand.

6. Wherefore the petitioner prays that this board may hear the proceeding and that proper credit for income and profits taxes paid to foreign countries be allowed against the petitioner's tax liability for the calendar year 1923.

EDGAR H. WALKER,
Counsel for the Petitioner,
509 So. Wabash Ave., Chicago, Ill. (*P. O. address*).

[*Duly sworn to by Edgar H. Walker; jurat omitted in printing.*]

5 *Exhibit A–1 to petition*

TREASURY DEPARTMENT,
Washington, Sept. 21, 1926.

IT:CR:Ad–60D–WLC.
CHICAGO PORTRAIT COMPANY,
509 South Wabash Avenue, Chicago, Illinois.

SIRS: An examination of your income-tax returns in connection with a revenue agent's report dated February 17, 1926, and of your books of account and records and those of your affiliated companies discloses a deficiency in tax for the years 1922 and 1923 of $1,919.59, as shown in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1926 you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United

States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:Ad–WLC–60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR, *Commissioner,*
By (s) C. R. NASH,
Assistant to the Commissioner.

6 *Exhibit A–2 to petition*

IT:CR:Ad–WLC.

Statement of returns examined and resulting tax liability

RETURNS EXAMINED

Company	Years	Form
Chicago Portrait Company	1922	1120
	1923	1120
Leach Art Company	1922	1120
	1923	1120
Independent Portrait Company	1922	1120
	1923	1120

TAX LIABILITY

Company	Years	Deficiency
Chicago Portrait Company, 509 S. Wabash Street, Chicago, Ill.	1922	None.
	1923	$1,919.59

The revenue agent's report dated February 17, 1926, has been made the basis for the above-stated result, in which the bureau concurs, as indicated in 30-day letter mailed to you on June 24, 1926.

The bureau has ruled that your company, the Leach Art Company, and the Independent Portrait Company were affiliated for the calendar years 1922 and 1923.

Now, Aug. 13, 1930, the foregoing petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Answer

Filed Jan. 19, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Respondent admits that the petitioner is a corporation with principal office at Chicago, Illinois.

2. Respondent admits that a notice of deficiency was mailed to the petitioner on September 21, 1926.

3. Respondent admits that the taxes in controversy are income taxes for the year 1923 in an amount not less than $1,919.59.

4. Respondent denies that he erred in determining the tax set forth in said notice of deficiency and further denies:

(a) That he erred in disallowing petitioner as a deduction in the year 1923 amounts alleged by the petitioner to represent income taxes paid by it to foreign countries.

(b) That he erred as alleged in subparagraph (b) of paragraph 4 of the petition and further denies that he failed to take into consideration income taxes paid by petitioner's foreign subsidiary to the Dominion of New Zealand.

(c) That he erred as alleged in subparagraph (c) of paragraph 4 of the petition.

5. (a) Respondent denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (a) of paragraph 5 of the petition, and therefore denies the same.

6. Respondent denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel Bureau of Internal Revenue.

Of Counsel:

DWIGHT H. GREEN,
Special Attorney, Bureau of Internal Revenue.

Now, Aug. 13, 1930, the foregoing answer certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

8 Before U. S. Board of Tax Appeals

Motion to file amended petition

Filed Mar. 20, 1929

Chicago Portrait Company, by Ernest H. Emery, its counsel, moves that the board grant leave to file an amended petition in order that the petitioner may conform its allegations of fact to its proof as set out in a stipulation of facts filed at the hearing in Chicago, Illinois, on this twentieth day of March, 1929.

ERNEST H. EMERY,
Counsel for Petitioner,
1433 Conway Building, Chicago, Illinois.

3/20/29. Granted 10 days to file amended petition.

FOREST D. SIEFKIN,
Member; U. S. Bd. of Tax Appeals.

Now, Aug. 13, 1930, the foregoing motion to file amended petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Amended petition

Filed March 25, 1929

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:Ad-60D-WLC) dated September 21, 1926, and, as a basis of its proceeding, alleges as follows:

1. Petitioner is an Illinois corporation with its principal office at 509 South Wabash Avenue, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on September 21, 1926.

3. The taxes in controversy are corporation income taxes for the calendar year 1923 and for $1,919.59.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The commissioner erred in refusing to allow as a credit
9 against petitioner's income-tax liability for the calendar year 1923 any portion of income taxes paid or accrued to foreign countries by petitioner's foreign subsidiary corporation, the International Art Company, Ltd., of Sydney, New South Wales, Australia, on dividends received by petition in 1923 from said foreign subsidiary.

(b) The commissioner erred in holding that income taxes paid or accrued by petitioner's foreign subsidiary, the said International Art Company, to New South Wales do not constitute "income taxes * * * paid during the same taxable year to any foreign country * * *" within the meaning of section 238 (a) of the revenue act of 1921.

(c) The commissioner erred in relying upon S. M. 1614, Cumulative Bulletin III–1, page 227, which ruling, petitioner contends, is an erroneous interpretation of the meaning of the words "any foreign country" as used in section 238 (a) of the revenue act of 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The Chicago Portrait Company, hereinafter called the petitioner, is a corporation organized under the laws of the State of Illinois, with its principal place of business at 509 South Wabash Avenue, Chicago, Illinois.

(b) That the petitioner keeps its books and files its returns upon the basis of a calendar year.

(c) That the petitioner keeps its books and files its returns upon the accrual basis.

(d) That during the calendar year 1923 the petitioner owned 51% of the total capital stock of the International Art Company, of Sydney, Australia, a foreign corporation.

(e) That the International Art Company kept its books on the basis of a fiscal year ended June 30th.

(f) That the net income of the International Art Company for the fiscal year ended June 30, 1923, was £7,772.9.0, and for the fiscal year ended June 30, 1924, was £8,170.7.0.

(g) That during the calendar year 1923 the International Art Company declared dividends as follows:

June 30, 1923	£5,953. 1. 7
September 15, 1923	1,275. 13. 3
December 31, 1923	708. 14. 0

(h) That during its taxable year ended December 31, 1923, the petitioner's share of the dividends declared by the International Art Company amount to £4,047.8.0, which, converted at the exchange rate at which said dividends were paid, namely, $4.55, amounted to $18,415.67.

10 (i) The petitioner's share of the dividends mentioned in paragraph (g) hereof are as follows:

Dividend of June 30, 1923	£3,086. 0. 0
Dividend of September 15, 1923	650. 0. 0
Dividend of December 31, 1923	361. 8. 0

(j) That the income taxes paid by the International Art Company upon its net income for the fiscal year ended June 30, 1923, were as follows:

To the Commonwealth of Australia	£395. 15. 0
To the State of New South Wales	986. 17. 6
Total income taxes paid	1,382. 12. 6

(k) That the income taxes paid by the International Art Company upon its net income for the fiscal year ended June 30, 1924, were as follows:

To the Commonwealth of Australia	£365. 4. 0
To the State of New South Wales	1,036. 12. 6
To the Dominion of New Zealand	114. 11. 8
Total income taxes paid	1,516. 8. 2

(l) That the exchange rates in effect at the dates the said three dividends were declared were as follows:

Dividend of June 30, 1923	$4.595
Dividend of September 15, 1923	4.545
Dividend of December 31, 1923	4.355

(m) That in determining the deficiency tax in question in the appeal at bar respondent refused to allow as a credit any portion of the income tax paid by the International Art Company to New South Wales for its fiscal years ended June 30, 1923 and 1924, in the amounts of £986.17.6 and £1,036.12.6, respectively, and also refused to allow as a credit any portion of the income taxes paid to the Commonwealth of Australia and the Dominion of New Zealand.

(n) That the respondent concedes that petitioner is entitled to credit against the tax due the United States the income taxes paid to the Commonwealth of Australia and the Dominion of New Zealand computed in accordance with the provisions of sec. 238 (e) of the revenue act of 1921.

(o) That the sole question to be determined by the Board in this appeal is whether New South Wales is a foreign country within the meaning of the revenue act of 1921.

6. Wherefore the petitioner prays that this board may hear the proceeding and may grant proper credit against petitioner's
11 income-tax liability for the calendar year 1923 on account of income taxes paid or accrued on dividends received from petitioner's foreign subsidiary, the said International Art Company, Ltd., of Sydney, New South Wales, Australia, to the Commonwealth of Australia, the Dominion of New Zealand, and to the State of New South Wales.

ERNEST H. EMERY,
Counsel for Petitioner,
1433 Conway Building, 111 W. Washington St.,
Chicago, Illinois.

Exhibit A to amended petition.

TREASURY DEPARTMENT,
Washington, Sep. 21, 1926.

IT:CR:Ad-60D-WLC.

CHICAGO PORTRAIT COMPANY,
509 South Wabash Avenue, Chicago, Illinois.

SIRS: An examination of your income-tax returns in connection with a revenue agent's report dated February 17, 1926, and of your

books of account and records and those of your affiliated companies discloses a deficiency in tax for the years 1922 and 1923 of $1,919.59, as shown in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1926 you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

12 If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:Ad–WLC–60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR, *Commissioner.*

(Signed) By C. R. NASH,
Assistant to the Commissioner.

Inclosures: Statement; Form A.

Statement of returns examined and resulting tax liability

RETURNS EXAMINED

Company	Years	Form
Chicago Portrait Company	1922	1120
	1923	1120
Leach Art Company	1922	1120
	1923	1120
Independent Portrait Company	1922	1120
	1923	1120

TAX LIABILITY

Company	Years	Deficiency
Chicago Portrait Company, 509 South Wabash Street, Chicago, Illinois	1922	None.
	1923	$1,919.59

The revenue agent's report dated February 17, 1926, has been made the basis for the above-stated result, in which the bureau concurs, as indicated in 30-day letter mailed to you June 24, 1926.

The bureau has ruled that your company, the Leach Art Company, and the Independent Portrait Company were affiliated for the calendar years 1922 and 1923.

[*Duly sworn to by J. Toms Dover; jurat omitted in printing.*]

13 Before United States Board of Tax Appeals

Answer to amended petition

Filed Apr. 10, 1929

Comes now the Commissioner of Internal Revenue, by his attorney. C. M. Charest, General Counsel Bureau of Internal Revenue, and for answer to the amended petition filed in the above-entitled appeal admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. (a) Denies the allegations of error contained in paragraph 4 (a) of the amended petition.

(b) Denies the allegations of error contained in paragraph 4 (b) of the amended petition.

(c) Denies the allegations of error contained in paragraph 4 (c) of the amended petition.

5. Admits the allegations contained in sub-paragraphs (a) to (o), inclusive, of paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified or denied.

14 Wherefore it is prayed that petition's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel Bureau of Internal Revenue.

Of Counsel:

ARTHUR H. MURRAY,
Special Attorney, Bureau of Internal Revenue.

AHM/vgs. 4/9/29.

Now, Aug. 13, 1930, the foregoing answer to amended petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Stipulation of facts

Filed Mar. 20, 1929

It is stipulated and agreed between the respective parties hereto, through their counsel, that the following facts are true and may be used by the board as the basis of its decision:

1. The Chicago Portrait Company hereinafter called the petitioner, is a corporation organized under the laws of the State of Illinois, with its principal place of business at 509 South Wabash Avenue, Chicago, Illinois.

2. That the petitioner keeps its books and files its returns upon the basis of a calendar year.

3. That the petitioner keeps its books and files its returns upon the accrual basis.

4. That during the calendar year 1923 the petitioner owned 51% of the total capital stock of the International Art Company, of Sydney, Australia, a foreign corporation.

5. That the International Art Company kept its books on the basis of a fiscal year ended June 30th.

6. That the net income of the International Art Company for the fiscal year ended June 30, 1923, was £7,722.9.0, and for the fiscal year ended June 30, 1924, was £8,170.7.0.

7. That during the calendar year 1923 the International Art Company declared dividends as follows:

June 30, 1923	£5,963. 1. 7
September 15, 1923	1,275. 13. 3
December 31, 1923	708. 14. 0

15 8. That during its taxable year ended December 31, 1923, the petitioner's share of the dividends declared by the International Art Company amounted to £4,047.8.0, which, converted at the exchange rate at which said dividends were paid, namely, $4.55, amounted to $18,415.67.

9. The petitioner's share of the dividends mentioned in paragraph 7 hereof are as follows:

Dividend of June 30, 1923	£3,036. 0. 0
Dividend of September 15, 1923	650. 0. 0
Dividend of December 31, 1923	361. 8. 0

10. That the income taxes paid by the International Art Company upon its net income for the fiscal year ended June 30, 1923, were as follows:

To the Commonwealth of Australia	£395. 15. 0
To the State of New South Wales	986. 17. 6
Total income taxes paid	1,382. 12. 6

11. That the income taxes paid by the International Art Company upon its net income for the fiscal year ended June 30, 1924, were as follows:

To the Commonwealth of Australia	£365. 4. 0
To the State of New South Wales	1,036. 12. 6
To the Dominion of New Zealand	114. 11. 8
Total income taxes paid	1,516. 8. 2

12. That the exchange rates in effect at the dates the said three dividends were declared were as follows:

Dividend of June 30, 1923	$4.595
Dividend of September 15, 1923	4.545
Dividend of December 31, 1923	4.355

13. That in determining the deficiency tax in question in the appeal at bar, respondent refused to allow as a credit any portion of the income tax paid by the International Art Company to New South Wales for its fiscal years ended June 30, 1923 and 1924, in the amounts of £986,17.6 and £1,036.12.6, respectively, and also refused to allow as a credit any portion of the income taxes paid to the Commonwealth of Australia and the Dominion of New Zealand.

14. That the respondent concedes that petitioner is entitled to credit against the tax due the United States the income taxes paid to the Commonwealth of Australia and the Dominion of New Zealand computed in accordance with the provisions of sec. 238 (e) of the revenue act of 1921.

15. That the sole question to be determined by the board in
16 this appeal is whether New South Wales is a foreign country within the meaning of the revenue act of 1921.

16. That upon the rendition of the interlocutory decision of the Board of Tax Appeals this appeal may be settled under rule 50 of the board's rules of practice.

ERNEST H. EMERY,
Counsel for Petitioner.
C. M. CHAREST,
Counsel for Respondent.

Now, Aug. 13, 1930, the foregoing stipulation certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Findings of fact and opinion

Promulgated June 24, 1929

A true copy. Teste: B. D. Gamble, clerk, U. S. Board of Tax Appeals. (Seal.)

New South Wales held to be a foreign country within the meaning of section 238 (e) of the revenue act of 1921.

Ernest H. Emery, Esq., for the petitioner.
Arthur H. Murray, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in income tax for 1923 in the amount of $1,919.59. The only issue is whether taxes paid to the State of New South Wales are taxes paid to a foreign country within the meaning of section 238 (e) of the revenue act of 1921. The respondent held that New South Wales was not a foreign country and determined the deficiency in question. The facts were stipulated.

FINDINGS OF FACT

The petitioner, The Chicago Portrait Company, is a corporation organized under the laws of the State of Illinois, with its principal place of business at Chicago, Illinois.

The petitioner keeps its books and files its returns upon the basis of a calendar year. It keeps its books and files its returns upon the accrual basis.

During the calendar year 1923 the petitioner owed 51% of the total capital stock of the International Art Company of Sydney,
Australia, a foreign corporation.
17 The International Art Company kept its books on the basis of a fiscal year ended June 30th.

The net income of the International Art Company for the fiscal year ended June 30, 1923, was £7,722.9.0, and for the fiscal year ended June 30, 1924, was £8,170.7.0.

During the calendar year 1923 the International Art Company declared dividends as follows:

June 30, 1923	£5, 953. 1. 7
September 15, 1923	1, 275. 13. 3
December 31, 1923	708. 14. 0

During its taxable year ended December 31, 1923, the petitioner's share of the dividends declared by the International Art Company amounted to £4,047.8.0, which, converted at the exchange rate at which said dividends were paid, namely, $4.55, amounted to $18,415.67.

The petitioner's share of the dividends declared in 1923 was as follows:

Dividend of June 30, 1923	£3, 036. 0. 0
Dividend of September 15, 1923	650. 0. 0
Dividend of December 31, 1923	361. 8. 0

The income taxes paid by the International Art Company upon its net income for the fiscal year ended June 30, 1923, were as follows:

To the Commonwealth of Australia	£395. 15. 0
To the State of New South Wales	986. 17. 6
Total income taxes paid	1, 382. 12. 6

The income taxes paid by the International Art Company upon its net income for the fiscal year ended June 30, 1924, were as follows:

To the Commonwealth of Australia	£365.4.0
To the State of New South Wales	1,036.12.6
To the Dominion of New Zealand	114.11.8
Total income taxes paid	1,516. 8.2

The exchange rates in effect at the dates the said three dividends were declared were as follows:

Dividend of June 30, 1923	$4.595
Dividend of September 15, 1923	4.545
Dividend of December 31, 1923	4.355

In determining the deficiency in question respondent refused to allow as a credit any portion of the income tax paid by the International Art Company to New South Wales for its fiscal years ended June 30, 1923 and 1924, in the amounts of £986.17.6 and
18 £1,036.12.6, respectively, and also refused to allow as a credit any portion of the income taxes paid to the Commonwealth of Australia and the Dominion of New Zealand.

The respondent concedes that petitioner is entitled to credit against the tax due the United States the income taxes paid to the Commonwealth of Australia and the Dominion of New Zealand computed in accordance with the provisions of section 238 (e) of the revenue act of 1921.

OPINION

SIEFKIN: The parties have stipulated the facts and have also agreed that the sole question to be determined by us is whether New South Wales is a foreign country within the meaning of the revenue act of 1921.

New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania were the six colonies united into a federal commonwealth known as the Commonwealth of Australia under an enabling act of the British Parliament dated July, 1900, effective January 1, 1901. The first five of these colonies are on the main land of the island of Australia, while Tasmania is a smaller island just south of the island of Australia. New South Wales is the oldest of the six States. In 1788, eighteen years after Captain Cook explored the east coast, Fort Jackson was founded as a penal settlement for criminals from England, and transportation was not suspended until about 1839. The legislative power of the State of New South Wales is vested in a federal parliament consisting of the sovereign, a senate, and a house of representatives, the sovereign being represented by a governor-general in whom the executive power is vested and who is assisted by an executive council appointed by himself. The constitution, parliament, and laws of each State, subject to the federal constitution, retain and safe-guard certain important state rights. New South Wales is a separate seat of government within its own boundaries.

The respondent contends that New South Wales is not a foreign country within the meaning of section 238 (e) of the revenue act of 1921, which is as follows:

"For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234 in any taxable year should be deemed to have paid the same proportion of any income, war-profits or excess-profits taxes paid by such foreign corporation to any foreign country, or to any possession of the United States upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: Provided, That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited which the amount of such dividend bears to the amount of entire net income of the domestic corporation in which dividends are included. * * *"

The argument of the respondent is that the term "country" is synonymous with the words "nation" or "state" and that in the absence of some qualifying phrase it has always been held to mean the composite whole made up of all the subdivisions of the foreign state subject to the same central control. The respondent argues that New South Wales, in this sense, is not a country but a part of a country.

On the other hand, the petitioner contends that Congress intended to use the phrase "foreign county" in section 238 (e) as inclusive of a taxing jurisdiction imposing an income tax outside of the jurisdiction of the income-tax levying jurisdiction of the United States.

We can assume that New South Wales is "foreign" in view of the discussion by Chief Justice Marshall in Cherokee Nation v. Georgia (30 U. S. 5 Peters 1, 56), in which the Cherokee Nation of Indians was held a foreign nation. In that opinion it was said:

"In a political sense we call every country foreign which is not within the jurisdiction of the same government. In this sense Scotland, before the union, was foreign to England, and Canada and Mexico foreign to the United States. In the United States all trans-Atlantic countries are foreign to us, but this is not the only sense in which it is used, * * *. For all national purposes embraced by the Federal Constitution the States and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects the States are necessarily foreign and independent of each other, their constitutions and forms of government being (though republican) altogether different, as are their laws and constitutions. * * *

"Thus in the clause giving jurisdiction to this court the term 'foreign state' is used instead of 'foreign nations' as in the

clause relating to commerce. And again, in Article I, paragraph 10, a still different phraseology is employed: 'No State, without the consent of Congress, shall enter into any agreement or compact with a "foreign power."' But each of these terms, 'nation,' 'state,' and 'power,' as used in different parts of the Constitution, imparts the same thing and does not admit of a different interpretation."

Similarly the cases involving the status of Porto Rico under the tariff act of July 24, 1897, indicate the extent to which our courts have gone in defining the phrase "foreign country." In De Lima v. Bidwell (182 U. S. 1) it was held that the island of Porto Rico, after its cession to the United States by the treaty with Spain, was no longer a foreign country within the meaning of the tariff act which declared that certain duties should be collected on all articles imported from foreign countries, and this, although Porto Rico had not been formally embraced by Congress within the customs union of the States. The court made the following observation at page 180:

"A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States, citing The Boat 'Eliza' (2 Gall. 4, Faber v. United States, 1 Story 1), The Ship 'Adventure' (1 Brock 234, 241)."

It is assumed in De Lima v. Bidwell, supra, that before Porto Rico was ceded by Spain it was a "foreign country" within the meaning of the tariff act.

The phrase "foreign country" was construed by the Supreme Court of the United States in Pearcy v. Stranahan (205 U. S. 257), where the court said:

"The Isle of Pines must be regarded at least de facto under the jurisdiction of the Republic of Cuba and hence as a foreign country within the meaning of Dingley Tariff Act, July 24, 1897 (c. 11, 30 Stat. 151), since the United States has never taken possession of such island as included in the territory ceded by Spain to the United States in the treaty of peace, but, instead, through its legislative and executive departments, has recognized the Cuban Government as rightfully exercising sovereignty over the Isle of Pines as a de facto government until the de jure status shall be determined."

The Supreme Court of the United States also stated in Faber v. U. S. 221 (U. S. 649, 658, 659):

"But in the absence of some qualifying phrase 'the term
21 "country" in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control.' (Stairs v. Peaslee, 18 How. 521.)"

An almost exact analogy to New South Wales, as embraced in the Commonwealth of Australia, is found in the various Provinces of Canada, and in Myers v. U. S. (140 Fed. 648) the court was consid-

ering an importation of wood pulp from Quebec. The Province of Quebec imposed a license fee for cutting wood on public lands, but reduced that license fee when the wood was manufactured into pulp in Canada. The court held that this license fee was, in effect, the imposition of an "export duty" on wood pulp exported to the United States within the meaning of the tariff act, which provided a countervailing duty on wood pulp equal to the amount of export duty imposed on wood pulp by the country of exportation. The court said:

"The Dominion of Canada is divided into Provinces, among which are Ontario and Quebec. By the British North America act (chapter 3, 30–31 Vict.) the Dominion of Canada has exclusive power to impose export or import duties. But in sections 91 and 92 of that act, we find, in the distribution of powers among the Provinces, that it is provided each provincial legislature has the following power of legislation: (1) Power of direct taxation within the Province, in order to the raising of revenue for provincial purposes; (2) management and sale of public lands belonging to the Province, and of the timber and wood thereon; (3) shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of the revenue for provincial, local, or municipal purposes. I think each Province has the power of taxation by way of license in those matters confided to it. If, in the exercise of this power lawfully granted, whether by the mother country direct or by it through the Dominion, the Province in point of fact and in effect imposes an export duty on pulp wood exported to the United States, it is an imposition of that duty by the Dominion of Canada. There is no question that the Dominion of Canada is a dependency of the Kingdom of Great Britain. I do not regard it necessary to recite the various laws, etc., bearing on the subject. In effect, by authority of law, an export duty is imposed. It is not done directly by the Kingdom of Great
22 Britain, or directly by the Dominion of Canada, but it is done under legislation authorized by the Dominion. I can not agree with the reasoning that arrives at a conclusion that this is not a duty imposed by a dependency of the country we call England, one of the great powers of the world. * * *"

In this proceeding we believe the position of the respondent is untenable. If New South Wales is, as he contends, merely a part of a larger government, either the Commonwealth of Australia or the British Empire, it must be that the imposition of the income tax imposed by New South Wales is, by reason of the delegation of powers to New South Wales, in effect an income tax of Australia or of the British Empire. If, however, this is not so, then New South Wales is not acting as a dependency or a portion of the whole, but as a sovereign state and as such is entitled to be classified as a foreign country in its own right. We conclude that his action was erroneous, not only for this reason, but also because we are satisfied that the purpose of Congress in section 238 (e) of the revenue act of 1921 and related sections applying to individuals intended to provide for a credit on income taxes paid to foreign political entities subject only

to the limitation imposed by reciprocal credit by that political entity.

Reviewed by the board.

Judgment will be entered under rule 50.

Now, Aug. 13, 1930, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Decision

Entered Sept. 5, 1929

Pursuant to opinion and findings of fact promulgated June 24, 1929, the respondent herein, to wit, on August 17, 1929, having filed a proposed redetermination for the year 1923, and the petitioner on August 24, 1929, having filed notice of acquiescence to the said proposed redetermination, it is

Ordered and decided that there is an overpayment for the year 1923 in the amount of $382.36.

(Signed) BENJAMIN H. LITTLETON,
Member, U. S. Board of Tax Appeals.

23 Enter.

Entered Sep. 5, 1929.

vlh

Now, Aug. 13, 1930, the foregoing decision certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

A true copy. Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Notice of filing petition for review

Filed Feb. 25, 1930

To CHICAGO PORTRAIT COMPANY,
509 Wabash Avenue, Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 14th day of February, 1930, file, with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review, by the United States Circuit Court for the Seventh

Circuit, of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated at Washington, D. C., this 14th day of February, 1930.

C. M. CHAREST,
General Counsel Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 18th day of February, 1930.

CHICAGO PORTRAIT COMPANY,
By R. B. STOUT, *Pres.*

acb 2/12/30

24 Before U. S. Board of Tax Appeals

Notice of filing petition for review

Filed Feb. 25, 1930

To ERNEST H. EMERY, ESQUIRE,
1433 Conway Building, 111 West Washington St.,
Chicago, Ill.

You are hereby notified that the Commissioner of Internal Revenue did, on the 14th day of February, 1930, file, with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review, by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated at Washington, D. C., this 14th day of February, 1930.

C. M. CHAREST,
General Counsel Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 18th day of February, 1930.

ERNEST H. EMERY,
Attorney for Respondent.

acb 2/12/30

Now, Aug. 13, 1930, the foregoing petition for review and notices of filing certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Petition of the Commissioner of Internal Revenue for a review of the decision of the United States Board of Tax Appeals

Filed Feb. 14, 1930

Now comes Robert H. Lucas, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, and C. M. Charest, General Counsel Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Chicago Portrait Company is a corporation, organized and existing under the laws of the State of Illinois, with its principal place of business at Chicago, Illinois, and filed its income tax return for the year 1923 with the collector of internal revenue for the first district of Illinois; that the said Chicago Portrait Company has its principal place of business, and the said collector of internal revenue for the first district of Illinois has his office, within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Seventh Circuit.

II

The nature of the controversy is as follows, to wit:

During the calendar year 1923, Chicago Portrait Company, the respondent, owned 51 per cent of the total capital stock of the International Art Company of Sydney, Australia, a foreign corporation.

The International Art Company kept its books on the basis of a fiscal year ended June 30. The net income of the International Art Company, for the fiscal year ended June 30, 1923, was £7,722.9.0, and for the fiscal year ended June 30, 1924, was £8,170.7.0.

During the calendar year 1923, the International Art Company declared dividends as follows:

June 30, 1923	£5,953. 1. 7
September 15, 1923	1,275. 13. 3
December 31, 1923	708. 14. 0

The rate of exchange of the pound sterling, in effect on the date on which each of the said three dividends were declared, was, as follows:

Dividend of June 30, 1923	$4.595
Dividend of September 15, 1923	4.545
Dividend of December 31, 1923	4.355

Chicago Portrait Company, the respondent, kept its books and filed its returns upon the basis of a calendar year. It kept its books and filed its returns upon the accrual basis.

During its taxable year ended December 31, 1923, respondent's share of the dividends declared by the International Art Company, as aforesaid, amounted to £4,047.8.0 (which, converted at the rate of exchange at which said dividends were paid, namely, $4.55, amounted to $18,415.67), computed as follows:

Dividend of June 30, 1923	£3,036. 0. 0
Dividend of September 15, 1923	650. 0. 0
Dividend of December 31, 1923	361. 8. 0

The income taxes paid by the International Art Company, upon its net income for the fiscal year ended June 30, 1923, were as follows:

To the Commonwealth of Australia	£395. 15. 0
To the State of New South Wales	986. 17. 6

The income taxes paid by the International Art Company, upon its net income for the fiscal year ended June 30, 1924, were as follows:

To the Commonwealth of Australia	£365. 4. 0
To the Dominion of New Zealand	114. 11. 8
To the State of New South Wales	1,086. 12. 6

In its income-tax return for the year 1923 taxpayer sought to credit to its tax liability for 1923 a proportionate part of the income taxes paid by the International Art Company to the State of New South Wales, the Commonwealth of Australia, and the Dominion of New Zealand, as aforesaid, under section 238 (e) of the revenue act of 1921.

The Commissioner of Internal Revenue, after duly auditing said return, sent a notice by registered mail to the taxpayer, under date of September 21, 1926, proposing a deficiency in tax for the year 1923, in the sum of $1,919.59. In determining the deficiency the commissioner disallowed as a credit to respondent's tax
27 liability for 1923 any portion of the income taxes paid by the International Art Company to the Commonwealth of Australia, the Dominion of New Zealand, and the State of New South Wales, as aforesaid.

On November 20, 1926, taxpayer filed a petition with the United States Board of Tax Appeals for the redetermination of the tax deficiency above mentioned. The commissioner filed an answer thereto January 19, 1927. Taxpayer filed an amended petition March 25, 1929, to which the commissioner filed an answer, on April 10, 1929. A hearing was held before the board March 20, 1929, at which hearing the commissioner conceded that taxpayer was entitled to credit a proportionate part of the income taxes paid by the International Art Company to the Commonwealth of Australia and the Dominion of New Zealand, under section 238 (e) of the revenue act of 1921. The parties then and there stipulated that the sole question to be determined by the board was whether the State of New South Wales is a foreign country, within the meaning of section 238 (e) of the revenue act of 1921, so that taxpayer may credit to its tax liability for 1923 a proportionate part of the income tax paid to the State of New South Wales by the International Art Company.

The opinion and interlocutory decision of the board was promulgated June 24, 1929, and on September 5, 1929, the board entered its order of redetermination that there is an overpayment of tax by this taxpayer, for the year 1923, in the sum of $382.36.

The board held that taxpayer was entitled to credit a proportionate part of the income tax paid to the State of New South Wales, upon the grounds that the State of New South Wales is entitled to be classified as a foreign country in its own right, and upon the further grounds that section 238 (e) of the revenue act of 1921 provides for a credit of income taxes paid to all foreign political entities, in which it included New South Wales.

III

The said commissioner being aggrieved by the conclusions of law contained in said decision, and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Seventh Circuit.

Wherefore he petitions that a transcript of record be prepared, in accordance with the rules of the United States Circuit Court
28 of Appeals for the Seventh Circuit, and transmitted to the clerk of said court for filing and appropriate action, to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the Seventh Circuit.

IV

The commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the State of New South Wales is a "foreign country" in its own right, within the provisions of section 238 (e) of the revenue act of 1921.

2. The Board of Tax Appeals erred in failing to hold and decide that the State of New South Wales is not a "foreign country," within the provisions of section 238 (e) of the revenue act of 1921.

3. The Board of Tax Appeals erred in holding and deciding that section 238 (e) of the revenue act of 1921 provides for the credit of income taxes paid to all foreign political entities.

4. The Board of Tax Appeals erred in failing to hold and decide that section 238 (e) of the revenue act of 1921 provides for the credit of income taxes paid to a foreign country only, and not to a political subdivision thereof.

5. That the Board of Tax Appeals erred in holding and deciding that the commissioner erred in disallowing a credit to taxpayer, for 1923, of a proportionate part of the income tax paid by International Art Company to the State of New South Wales, under section 238 (e) of the revenue act of 1921.

6. The Board of Tax Appeals erred in failing and refusing to hold and decide that no part of the income tax paid by International

Art Company to the State of New South Wales is an allowable credit to taxpayer's tax liability for 1923, under section 238 (e) of the revenue act of 1921.

7. The Board of Tax Appeals erred in entering its final order of redetermination that there is an overpayment in income tax of Chicago Portrait Company, for the year 1923, in the sum of $382.36.

8. The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is a deficiency in income tax due from Chicago Portrait Company, for the year 1923, in such sum as would be found by disallowing the credit of any part of the income tax paid by the International Art Company to the State of New South Wales.

29

G. A. YOUNGQUIST,
Assistant Attorney General.
C. M. CHAREST,
General Counsel Bureau of Internal Revenue.
PREW SAVOY,
Special Attorney, Office of the General Counsel, Bureau of Internal Revenue.

acb 2/ 2/12/30.

[*Duly sworn to by C. M. Charest; jurat omitted in printing.*]

30 Before U. S. Board of Tax Appeals

Order enlarging time

Entered Apr. 11, 1930

On motion of counsel for the petitioner it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United States Circuit Court of Appeals, Seventh Circuit, be, and it is hereby, extended to June 16, 1930.

(Signed) J. E. MURDOCK,
Member.

A true copy. Teste:
[SEAL.]
B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Dated, Washington, D. C., April 11, 1930.

Before U. S. Board of Tax Appeals

Order enlarging time

Entered June 16, 1930

On motion of counsel for the petitioner it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the

above-entitled proceeding in the United States Circuit Court of Appeals, Seventh Circuit, be, and it is hereby, extended to August 15, 1930.

(Signed) LOGAN MORRIS,
Member.

A true copy. Teste:
[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.
Dated, Washington, D. C., June 16, 1930.

31 Before United States Board of Tax Appeals

Præcipe

Filed Aug. 4, 1930

To the Clerk of the United States Board of Tax Appeals:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the review taken in the above-entitled case, and to include, in such transcript of record, copies duly certified as correct of the following documents:

1. Docket entries of proceedings before the board.
2. Pleadings before the board.
a. Petition.
b. Answer.
c. Stipulation of facts.
d. Motion to file amended petition.
e. Amended petition.
f. Answer to amended petition.
3. Findings of fact, opinion, and decision of the board.
a. Order of redetermination.
4. Petition for review and assignments of error.
a. Notice of filing thereof with proof of service.
5. This præcipe.

(Sgd.) C. M. CHAREST,
General Counsel Bureau of Internal Revenue.

I hereby this 29th day of July, 1930, accept due personal service of a copy of the foregoing præcipe.

(Sgd.) ARNOLD R. BAAR,
(Sgd.) HERMAN T. REILING,
Attorney for Respondent,
11 S. La Salle St., Chicago.

acb 7/10/30.

Now, Aug. 13, 1930, the foregoing præcipe certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

32 [Clerk's certificate to foregoing transcript omitted in printing.]

33 [Appearances of counsel omitted in printing.]

34 [Omitted.]

35 In United States Court of Appeals for the Seventh Circuit

B. T. A. No. 21396; C. C. A. No. 4434

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO PORTRAIT COMPANY, RESPONDENT

Motion to substitute party petitioner

Filed Oct. 29, 1930

Comes now David Burnet, as Commissioner of Internal Revenue, by and through his attorney, C. M. Charest, General Counsel Bureau of Internal Revenue, and respectfully shows to this court;

That on the 14th day of February, 1930, within six months after the decision of the United States Board of Tax Appeals, the Commissioner of Internal Revenue, pursuant to the provisions of section 1001 (a) of the revenue act of 1926, as amended by section 603 of the revenue act of 1928, filed a petition with the board to have its decision reviewed by the United States Circuit Court of Appeals for the Seventh Circuit.

That since the filing of the petition for review in the above-entitled cause Robert H. Lucas, who was at that time Commissioner of Internal Revenue, and was the petitioner at that time in the above-entitled cause, has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted.

That Robert H. Lucas ceased to be Commissioner of Internal Revenue on the 15th day of August, 1930.

That David Burnet was duly appointed as Commissioner of Internal Revenue to succeed the said Robert H. Lucas, and has duly qualified as said Commissioner of Internal Revenue.

That on August 20, 1930, said David Burnet became Commissioner of Internal Revenue, and ever since that time has been and now is Commissioner of Internal Revenue.

Wherefore it is accordingly prayed that the above-entitled cause be revived so that this action will be pending by the said David
36 Burnet, as Commissioner of Internal Revenue, as against the respondent in the above-entitled cause, and that the said David Burnet, as Commissioner of Internal Revenue, be substituted as the petitioner in this cause for the said Robert H. Lucas, formerly Commissioner of Internal Revenue.

It is further shown to this court that there is substantial need for so continuing and maintaining this cause, because if it is not so continued and maintained, the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; that no part of the amount determined as the deficiency by the commissioner but disallowed as such by the decision of the board, which would thus become final, could ever be assessed or collected by distraint or by proceeding in court with or without assessment, or by any other method or form of proceeding.

It is further shown to this court that the said David Burnet, as Commissioner of Internal Revenue, by and through his attorney, has caused to be mailed to the attorney of record for the respondent in the above-entitled cause a copy of this motion to revive this action in the name of David Burnet, as Commissioner of Internal Revenue, and to have his name substituted as petitioner in this cause.

C. M. CHAREST,
General Counsel Bureau of Internal Revenue,
Attorney for David Burnet,
as Commissioner of Internal Revenue.

[*Duly sworn to by C. M. Charest; jurat omitted in printing.*]

37 In United States Circuit Court of Appeals

[Title omitted.]

Order substituting party petitioner

Oct. 29, 1930

On motion of counsel for petitioner it is ordered by the court that this cause be revived so that the same will be pending in the name of David Burnet, as Commissioner of Internal Revenue, petitioner, against the Chicago Portrait Company, respondent.

It is further ordered that the said David Burnet, as Commissioner of Internal Revenue, be substituted for and in the place of Robert H. Lucas, as petitioner in this cause.

38 In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

April 14, 1931

It is ordered by the court that this cause be, and the same is, hereby set down for hearing May 13, 1931.

[Minute entering of argument and submission, May 13, 1931, omitted in printing.]

39 In United States Circuit Court of Appeals for the Seventh Circuit

No. 4434. October term, 1930, April session, 1931

COMMISSIONER OF INTERNAL REVENUE, petitioner

vs.

CHICAGO PORTRAIT COMPANY, respondent

Petition for review of decision of the United States Board of Tax Appeals

Opinion

Filed June 11, 1931

Before ALSCHULER, EVANS, and SPARKS, Circuit Judges

ALSCHULER, Circuit Judge: Review is sought of a ruling of the Board of Tax Appeals which sustained respondent's contention that it was entitled to deduct from its Federal income tax for the year 1923 the amount of an income tax for that year which it was required to pay upon its business done in New South Wales. (16 B. T. A. 1129.)

Respondent company is an Illinois corporation, and in the year in question owned 51 per cent of the voting stock of a subsidiary corporation of New South Wales. For that year the commissioner credited upon the income tax here returned income taxes of the subsidiary corporation levied by and paid to the Commonwealth of Australia and the Dominion of New Zealand, but refused to credit thereon any part of the income taxes paid by it to New South Wales.

The question involved is whether New South Wales comes
40 within the designation "any foreign country" as employed in section 238 of the revenue act of 1921, the applicable part of which is:

"SEC. 238. (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: * * *"

New South Wales has been a British possession ever since Captain Cook visited it in 1770. Responsible government was conferred upon it in 1855, with a "legislative council" appointed by the Crown and an "elective legislative assembly." It was entirely separate and distinct from the other Australian colonies of Great Britain.

In 1900 the Commonwealth of Australia came into existence through a pact, to which New South Wales was a party, which

adopted a constitution delegating certain designated powers to the Government of the Commonwealth. In respect to other matters the constituent parties remained as they were before, each carrying on its own government, very much as with the States of the United States.

This grant of powers to the Commonwealth left New South Wales none the less a self-governing colony. It had and has the power to levy taxes. Income taxes were levied by it before it entered the Commonwealth, and have been ever since, under its sovereign authority to levy such taxes.

The word "country" can not be given a hard and fast definition, applicable alike to every situation in which it is employed. Petitioner places much reliance upon the manner of its use in the case of Stairs v. Peaslee (18 How. 521), where there was involved a question of appraisal of imported goods for tariff purposes. The law required the value to be such as the imported articles had at the principal markets of the country from which exported. The article there in question had been shipped from India to Nova Scotia, where there was practically no market for such product, and thence reshipped to the United States.

The importer contended that the appraisal should be based on Halifax (N. S.) value, but the appraisers fixed the value as that of London and Liverpool, finding them to be the principal markets for the article of the country whence imported. The court held
that under the revenue law it was not a question of law but of
41 fact for the appraisers to decide which place in the entire British dominion was the principal market therefor, saying, "the word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State however widely separated, which are subject to the same supreme executive and legislative control."

The opinion discloses also a very good reason for limiting its application to cases where import duties were involved. The court said:

"And, moreover, if the construction contended for by the plaintiff could be maintained, it would soon be found that goods would not generally be exported directly to the United States, from the principal market where they were procured, but sent to some other place where they were not in demand, to be shipped to this country, and invoiced far below their real value. The case before us shows what may be done to evade the payment of the just amount of duty; and neither the words of any revenue law, nor any policy of the government, would justify a construction alike injurious to the public and to the fair and honest importer."

Since that decision the political status of New South Wales and of some other British colonies has materially changed, so that they now far more nearly partake of the attributes of soverign, self-governing nations, especially in their commercial relations. It is

at least interesting to note that the opinion was rendered in 1855, the same year in which responsible government was first conferred upon New South Wales.

Indeed, if Stairs v. Peaslee were held applicable to sec. 238 (a) as applied to the entire British Empire, no income tax imposed by any British colony could be deducted, since only such British income taxes as were imposed by the Government of Great Britain alone would be deductible. Neither income taxes of the Australian Commonwealth, nor of New Zealand, which were in fact deducted, nor of Canada, or other independent self-governing colony would be deductible.

The evident purpose of section 238 is to prevent duplication of income and war-profits taxation upon the same income, and there is no logical reason why the deduction which the section undertakes to authorize should be that of one form of government or of another, so long as the country by which the tax is levied and to which it is paid is foreign to the United States.

We see no reason why the proper administration of section 238 would authorize deduction of such taxes when paid to the Commonwealth of Australia or to New Zealand, or both, and be denied when paid to the self-governing colony of New South Wales.

The judgment of the Board of Tax Appeals is affirmed.

42 [Omitted.]

43 In United States Circuit Court of Appeals

4434

COMMISSIONER OF INTERNAL REVENUE

vs.

CHICAGO PORTRAIT COMPANY

Petition for review of order of the United States Board of Tax Appeals

Judgment

June 11, 1931

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals entered in this cause on September 5, 1929, be, and the same is hereby, affirmed.

44 [Clerk's certificate to foregoing transcript omitted in printing.]

45 Supreme Court of the United States

Order allowing certiorari

Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Indorsement on cover: Enter. Attorney General. File No. 36192. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 378. David Burnet, Commissioner of Internal Revenue, Petitioner, vs. Chicago Portrait Company. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1931. File No. 36192.

U. S. GOVERNMENT PRINTING OFFICE

FILE COPY

No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1931

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO PORTRAIT COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CHICAGO PORTRAIT COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 11, 1931 (R. 38), affirming the judgment of the Board of Tax Appeals (R. 22).

QUESTION PRESENTED

Whether the State of New South Wales is a "foreign country" within the meaning of Section 238

of the Revenue Act of 1921, which allows a credit against income tax on account of income taxes paid to a "foreign country."

STATEMENT

During the calendar year 1923 the respondent, an Illinois corporation, owned 51 per cent of the voting stock of, and received dividends from, the International Art Company, of Sydney, Australia. During that year the Australia corporation paid income taxes, respectively, to the Commonwealth of Australia, to the Dominion of New Zealand, and to the State of New South Wales. Petitioner included in the gross income of the respondent for 1923 the dividends received from the Australia corporation, and he allowed credits against income taxes due from respondent to the United States, on account of income taxes paid to the Commonwealth of Australia and to the Dominion of New Zealand, but refused to allow credit for any portion of the taxes paid to New South Wales. (R. 16-18.)

The respondent appealed to the Board of Tax Appeals (R. 3), which entered judgment in favor of respondent (R. 18-22). On a petition to review that judgment, the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the Board of Tax Appeals. (R. 38.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the State of New South Wales was a "foreign

country" within the meaning of that term as used in Section 238 of the Revenue Act of 1921.

The Circuit Court of Appeals erred in holding, in effect, that Congress in enacting Section 238 intended to allow credit for income and profits taxes imposed by all governmental authority foreign to the United States.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals has construed the term "foreign country" as used in Section 238 of the Revenue Act of 1921 to embrace any foreign governmental authority which may impose income or profits taxes. It is believed this construction is erroneous and in conflict with the judicial definitions of the term.

The construction of the Circuit Court of Appeals is contrary to the construction given by the Treasury Department for a period of upwards of ten years. If allowed to stand, it will require credits against taxes of a kind not heretofore allowed, and necessitate refunds of taxes estimated at over $2,000,000 and will substantially affect the amount of taxes to be paid in the future by a large number of corporations.

The question presented is one of general importance, involving large sums in taxes and affecting a large number of taxpayers, which has not been but should be settled by this Court. The question arises under all of the revenue acts since the Revenue Act of 1918.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1931.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–22) is reported in 16 B. T. A. 1129. The opinion of the Circuit Court of Appeals (R. 36–38) is reported in 50 F. (2d) 683.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered June 11, 1931. (R. 38.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the state of New South Wales is a "foreign country" within the meaning of Section 238 of the Revenue Act of 1921, which allows a credit against income tax on account of income taxes paid to a "foreign country."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 14–18.

STATEMENT

A statement of the facts and the errors to be relied upon will be found in the petition.

ARGUMENT

The provisions allowing a credit of taxes paid to a "foreign country" first appeared in the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sections 238 (a) and 240 (c). So far as the use of these words is concerned, no change has been made by Congress in the succeeding Revenue Acts, where the same language is found in Section 238 (a) and (e) of the Acts of 1921, c. 136, 42 Stat. 227; 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 990); and 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 990), and in Section 131 (a) (1) and (f) of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C. Sup. IV, Title 26, Sec. 2131).

Article 382 of Treasury Regulations 45, promulgated under the Revenue Act of 1918, defined "foreign country" as meaning "any foreign sovereign state or self-governing colony." This definition has been continued without change in all of the succeeding regulations. Article 382 of Regulations 62, under the Act of 1921; Article 382 of Regulations 65, under the Act of 1924; Article 382 of Regulations 69, under the Act of 1926; and Article 692 of Regulations 74, under the Act of 1928.

While the definition referred to has remained unchanged in all of the regulations since the Rev-

enue Act of 1918, there has been some departure therefrom in the practice of the Bureau of Internal Revenue under another section of the law. Section 222 (a) of the Revenue Act of 1921, *infra*, allows credits to alien resident individuals of income taxes paid to any foreign country, if the foreign country of which such alien resident is a citizen or subject allows a similar credit to citizens of the United States residing in such country. The regulations contain an incomplete list of countries which satisfy the credit requirement of Section 222 and those which do not do so. Article 385 of Regulations 62 (*infra*, pp. 16–18); Article 307 of Regulations 45, under the 1918 Act. Among the governmental or territorial divisions listed are some which do not meet the test of being sovereign states, in the international sense, or self-governing colonies. However, the definition embodied in Article 382 of Regulations 62 (*infra*, p. 16) has been adhered to in theory and has been consistently applied under Section 238. It is submitted that it is sound in principle.

The states of Australia, including New South Wales, and the provinces of Canada, have always been regarded as not coming within the term "foreign country" and credits have been denied under Section 238. The following rulings bearing on the term as defined in Article 382 have been made:

October 18, 1919, Solicitor's Memorandum 1187, not reported. This dealt with the status of

one of the cantons of Switzerland and, in holding that it was not a sovereign state, said:

> In the absence of some qualifying phrase, the word "country" in the revenue laws of the United States has always been held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country" but a part of a country.

September 28, 1921, O. D. 1050, C. B. 5, p. 194. This office decision, following S. M. 1187, *supra*, held that British Columbia did not come within the term as used in the Revenue Act of 1918.

Solicitor's Memorandum 1614, March 24, 1924, C. B. III-1, p. 227. This memorandum held that New South Wales was not a "foreign country" within the meaning of the 1918 Act and as defined in Article 382 of Regulations 45, but that it was one of the subdivisions of the Commonwealth of Australia.

It is also consistent with judicial interpretations of the words "country," "foreign country," and similar phrases, as used in various Acts relating to tariffs, to revenue, navigation, and so forth. One of the leading cases is *Stairs* v. *Peaslee*, 18 How. 521, which arose under the Tariff Act of 1851. That Act provided that the appraisal of goods imported should be on the market value of similar articles in the "principal markets of the country of produc-

tion or manufacture." The article imported was produced in Calcutta, India, shipped to the United States via Halifax, and valued on the markets of London and Liverpool. It was held that the determination of the appraisers that those cities were the principal markets of "the country of production" was authorized under the law, this Court saying (p. 526):

> * * * the word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control.

It is of course conceded that New South Wales is "foreign." The sole question is whether it is a "country." The definition embodied in Article 382 of Regulations 62 (*infra*, p. 16) is in accord with the meaning of the word "country" as recognized and used in international law. *United States* v. *The Ship Recorder*, 1 Blatchford 218; Wharton, Conflict of Laws, 3d Ed., Vol. 1, p. 32, Note 2; Hyde, International Law, Vol. 1, pp. 16–17; Moore, International Law Digest, Vol. 1, pp. 14–15.

We do not conceive that the language quoted above from *Stairs* v. *Peaslee* is inconsistent with the modern conception of such entities as Australia, New Zealand, and Canada as "countries." The inclusion of these dominions as "countries" in the Treasury Regulations is simply a recognition of the gradual development in interna-

tional law and politics which has given rise to the British Commonwealth of Nations. The British dominions now are "countries," although it is very possible that at the time of *Staire* v. *Peaslee* they would not have been so regarded.

The above language from *Staire* v. *Peaslee* was quoted by this Court in *Faber* v. *United States*, 221 U. S. 649, 659, which arose under the Tariff Act of 1897, where it was held that the Philippine Islands were a part of this nation, and were not "another country."

It is contended that New South Wales is not a foreign sovereign state or self-governing colony within the meaning of the statute and the regulations. It is one of the constituent states of the Commonwealth of Australia, and so far as the question here presented is concerned it bears the same relation to the Commonwealth as one of the states of the United States bears to the Federal Government. New South Wales is sovereign only in the same limited sense as is a State of the United States. It is not a sovereign in relation to foreign governments. It is not a "country."

The Commonwealth of Australia is an autonomous state under a constitution adopted in 1900. (63 Victoria, c. 12.) It is a government of granted powers. Such powers as are not exclusively vested in the Commonwealth or withdrawn from the constituent states remain with the states. (Sec. 107.) The parliament of the Commonwealth

is granted general powers, among others, over trade and commerce with other countries; telegraphic, telephonic, and like services; the naval and military defense of the Commonwealth and of the several states; navigation; quarantine; currency, coinage, and legal tender; copyrights, patents, and trade-marks; naturalization and aliens; immigration and emigration; external affairs. (Sec. 51.) From this it is apparent that whatever may have been the international status of the Colony of New South Wales prior to the adoption of the Constitution of the Commonwealth of Australia, since that time the entity empowered to deal with foreign nations and the one recognized in international law has been the Commonwealth, and New South Wales has not been a foreign country in the sense in which the term is used in international law. The Commonwealth of Australia has been recognized by the United States at various times as a foreign state or nation,[1] but no conventions or

[1] On June 19, 1905, a parcels-post convention was entered into between the two countries. (34 Stat. 2872, Pt. 3.) On March 30, 1910, the President of the United States issued a proclamation (36 Stat. 2679, Pt. 2) admitting articles imported from the Commonwealth of Australia under the terms of the minimum tariff as provided in Section 2 of the Tariff Act of 1909 (c. 6, 36 Stat. 11, 82). On April 3, 1918, the President issued a proclamation (40 Stat. 1764, Pt. 2) relative to reciprocity in connection with copyrights. This proclamation was pursuant to Section 8 of the Act of March 4, 1909 (c. 320, 35 Stat. 1075, 1077), which authorized the extension of the principle of reciprocity to citizens or subjects of a "foreign state or nation."

proclamations have been made recognizing New South Wales as a "foreign country" or a "foreign state or nation."

It is not reasonably probable that Congress intended to allow credits to corporations for taxes paid to states or other subdivisions of a foreign country, while withholding similar credits for taxes paid to the states of the United States or subdivisions thereof. Such taxes are deducted from gross income in computing net income, under Section 234 (a) (3) of the Revenue Act of 1921. This is a general provision permitting the deduction of taxes, with certain exceptions, one of which is "(b) so much of the income, war-profits and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit under section 238." The taxes here would be deductible from gross income under Section 234 (a) (3) if not credited under Section 238.

The grant of the right to credit taxes paid to a foreign country is in the nature of a grant of an exemption, since the credit operates to reduce the amount of tax which would otherwise be payable. It is in the nature of an extraordinary benefit granted to the taxpayer. Such grants are construed most strongly in favor of the Government. *Cornell* v. *Coyne*, 192 U. S. 418, 431; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 146.

CONCLUSION

It is respectfully submitted that the petition for certiorari in this case should be granted.

THOMAS D. THACHER,
Solicitor General.
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ERWIN N. GRISWOLD,
Attorney.

SEPTEMBER, 1931.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 249, 258, 259:

SEC. 238. (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided,* That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term "net income," as used in this subdivision means net income as defined in sections 245 and 246, respectively.

* * * * *

(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234), in any taxable year shall be deemed to have paid the same

proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided,* That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term "accumulated profits" when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an accounting period of less than one year, the word "year" as used in this sub-

division shall be construed to mean such accounting period.

SEC. 222. (a) That the tax computed under Part II of this title shall be credited with:

(1) In the case of a citizen of the United States, the amount of any income, war-profits, and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States; and

* * * * * *

(3) In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; * * *

Treasury Department Regulations 62:

ART. 382. *Meaning of terms.*—"Amount of * * * taxes paid during the taxable year" means taxes proper (no credit being given for amounts representing interest or penalties) paid or accrued during the taxable year on behalf of the individual claiming credit. "Foreign country" includes within its meaning any foreign sovereign state or self-governing colony (for example, the Dominion of Canada), but does not include a foreign municipality (for example, Montreal) unless itself a sovereign state (for example, Hamburg). "Any possession of the United States" includes, among others, Porto Rico, the Philippines, and the Virgin Islands. As to the meaning of "sources" see section 217. See also section 2 of the statute.

ART. 385. *Countries which do or do not satisfy the similar credit requirement.*—(a)

The following is an incomplete list of the countries which satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1921, either by allowing to citizens of the United States residing in such countries a credit for the amount of income, war-profits, or excess-profits taxes paid to the United States, or in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such countries: Bulgaria, Canada, Italy, Newfoundland, Salvador. (*b*) The following is an incomplete list of the countries which do not satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1921, either by allowing no credit to citizens of the United States residing in such countries, for the amount of income, war-profits, or excess-profits taxes paid to the United States, or because such countries do not impose any income, war-profits, or excess-profits taxes: Argentina, Bahama, Belgium, Bermuda, Bolivia, Bosnia, Brazil, Chile, China, Costa Rica, Dutch Guiana, Ecuador, Egypt, Finland, France, Great Britain and Ireland, Guatemala, Herzegovina, India, Jamaica, Japan, Montenegro, Morocco, New Zealand, Nicaragua, Panama, Paraguay, Persia, Peru, Portugal, Rumania, Santo Domingo, Serbia, Siam, Straits Settlements, Sweden, Switzerland, Venezuela. The former names of certain of these territories are here used for convenience in spite of the actual or possible change in the name or sovereignty. A resident of the United States who is a citizen or subject of any country in the first list is entitled, for the purpose of the total tax due the United States for 1921 (as to fiscal years beginning in 1920, see art.

386) and subsequent years, to a credit for the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country. If he is a citizen or subject of any country in the second list, he is not entitled to such credit. If he is a citizen or subject of a country which is in neither list, then to secure the desired credit he must prove to the satisfaction of the Commissioner that his country satisfies the similar credit requirement of the statute.

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FILE COPY

No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1931

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO PORTRAIT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 378

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CHICAGO PORTRAIT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16-22) is reported in 16 B. T. A. 1129. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 36–38) is reported in 50 F. (2d) 683.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 11, 1931. (R. 38.) The petition for certiorari was filed September 11, 1931, and the writ was granted October 26, 1931. Jurisdiction is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the State of New South Wales is a "foreign country" within the meaning of Section 238 of the Revenue Act of 1921, which allows credit against income tax on account of income taxes paid to a "foreign country."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are contained in Appendix A, *infra*, pp. 22–27.

STATEMENT

The stipulated facts contained in the findings of fact of the Board of Tax Appeals may be summarized as follows (R. 16–18):

During the calendar year 1923, the respondent, an Illinois corporation, was the owner of 51 per cent of the voting stock of the International Art Company of Sydney, Australia, a foreign corporation (hereinafter referred to as the Australian corporation). During that year, the Australian corporation declared dividends, respondent's share of which, at the then current rate of exchange, aggregated $18,415.67.

The Australian corporation paid income taxes to the Commonwealth of Australia, to the State of New South Wales and to the Dominion of New Zealand, upon its net income for fiscal years ending June 30, 1923, and June 30, 1924. Petitioner refused to allow any credit against income taxes due from respondent to the United States on account of

income taxes paid by the Australian corporation to the State of New South Wales, but he did allow credit on account of such taxes paid to the Commonwealth of Australia and the Dominion of New Zealand. The Board held that respondent was entitled to credit for taxes paid to New South Wales. (R. 18–22.) The court below affirmed the decision of the Board. (R. 36.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the State of New South Wales is a "foreign country" within the meaning of this term as used in Section 238 of the Revenue Act of 1921.

2. In holding, in effect, that Congress in enacting Section 238 intended to allow credit for income and profits taxes imposed by any governmental authority foreign to the United States.

SUMMARY OF ARGUMENT

The term "foreign country" has been defined by the applicable regulations as including "any foreign sovereign state or self-governing colony" under all the Revenue Acts since 1918. Although there has been some slight departure therefrom in practice under other sections of the Revenue Acts, it has been consistently applied under this section and the rulings of the Bureau of Internal Revenue thereunder have followed this construction. The construction has implied legislative approval. It is supported by judicial interpretation of the word

"country" and conforms to the usage of that word in international law. As the provision for credit is in the nature of an exemption, it is to be construed most strongly in favor of the Government.

New South Wales is not a foreign country within the meaning of Section 238(a) or of Article 382 of Regulations 62. It is not a sovereign state in the international sense, but is a constituent state of the Commonwealth of Australia. Its position in the Commonwealth closely resembles that of a State of the United States in our Federal Government.

It is not a self-governing colony. This term was used in the Treasury Regulations synonymously with sovereign state so as to embrace the great self-governing dominions of the Commonwealth of British Nations. Under the modern conception these dominions are international states, and hence are within the meaning of "foreign country" as defined in Article 382.

ARGUMENT

I

ONLY TAXES PAID TO A FOREIGN SOVEREIGN STATE OR A SELF-GOVERNING COLONY ARE DEDUCTIBLE UNDER SECTON 238 OF THE REVENUE ACT OF 1921

Section 238 of the Revenue Act of 1921 (*infra*, p. 22) provides for crediting, against income taxes due from domestic corporations owning a majority of the stock of foreign corporations upon

which dividends are paid, of a part of the taxes paid by such foreign corporations to "any foreign country."

We contend that the term "foreign country" as so used means a foreign sovereign state or self-governing colony.

In the court below the respondent contended broadly that the phrase includes any foreign authority which imposes income or profits taxes whether it be of the dignity of a sovereign state or the most insignificant political subdivision or dependency.

The term has been defined by Regulations under all the Revenue Acts since that of 1918 as meaning any foreign sovereign state or self-governing colony. (See pp. 28–32, *infra.*)

Provisions allowing to corporations a credit of taxes paid to a foreign country first appeared in the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1080, 1081, Section 238 (a) and 240 (*e*). So far as the use of these words is concerned, no change has been made by Congress in the succeeding Revenue Acts, where the same language is found.[1] In the Treas-

[1] Section 238 (a) and (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227 (*infra*, pp. 22–24); Section 238 (a) and (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 990); Section 238 (a) and (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 990); and Section 131 (a) (1) and (f) of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C. Sup. V, Title 26, Sec. 2131.)

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ury Regulations under the Act of 1918, the definition of foreign country was adopted which later appeared in Article 382 of Regulations 62, (*infra*, p. 25) under the Act of 1921, and it has been continued in the same form in the Regulations under all of the Revenue Acts since enacted.[2]

In connection with the definition of the phrase "foreign country" contained in this long series of Regulations, three examples were always given in the Regulations. The definition was said to include a self-governing colony (for example, the Dominion of Canada); not to include a foreign municipality (for example, Montreal) unless itself a sovereign state (for example, Hamburg). The definition seems clear enough without resort to example, nor does the use of examples, if ill-chosen, limit the definition. The fact that Hamburg lacked

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[2] Article 382, Regulations 45 (promulgated April 17, 1919, and also 1920 Edition, promulgated January 28, 1921), under the Revenue Act of 1918 (made applicable to credits under Section 238, Article 611, Regulations 45); Article 382, Regulations 65, under the Revenue Act of 1924; Article 382, Regulations 69, under the Revenue Act of 1926; Article 692, Regulations 74, under the Revenue Act of 1928.

The "Preliminary Edition" of Regulations 45, in Article 382, defined the term as follows: "'Foreign country' means any governmental authority, not that of the United States or any part or possession thereof, having power to impose such taxes, and it therefore includes a self-governing colony, such as the Dominion of Canada." But this draft of Regulations was in force only a short time as the Act of 1918 was approved February 24, 1919, and the first regular edition of Regulations 45, adopting the definition since followed, was issued April 17, 1919.

some of the attributes of a sovereign state, as that phrase is used in international law, does not open the definition to include all subordinate subdivisions of a foreign government. Such agencies are not sovereign states. The error obviously was in specifying Hamburg as an example of a sovereign state. The example was ill chosen but this mistake does not qualify the statement of the rule which is clear enough.

While the rule has remained in all of the Regulations since those under the Revenue Act of 1918, apparently there has been some departure therefrom in the practice of the Bureau of Internal Revenue under two other sections of the law. Section 222 (a) of the Revenue Act of 1921 (*infra*, p. 24) allows credits to alien resident individuals of income and profits taxes paid to any foreign country if the foreign country of which such alien resident is a citizen or subject allows a similar credit to citizens of the United States residing in such country. The Regulations applicable to Section 222 (a) list certain "countries" which satisfy and others which do not satisfy the credit requirements of Section 222. Article 385, Treasury Regulations 62, *infra*, pp. 26–27.[3] Another list is given in Regulations under the later Revenue Acts with

[3] Similar lists were contained in Article 307, Regulations 45, relating to the reciprocal allowance of credits for personal exemption and for dependents, provided for by Section 216 (e) of the Revenue Act of 1918. (This provision does not appear in the subsequent acts.)

respect to provisions similar to Section 213 (b) (8) of the Revenue Act of 1921 (*infra*, p. 24), which excludes from the income of a nonresident alien or foreign corporation earnings derived from ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States.[1] Without attempting to analyze the nature of the governments of the "countries" mentioned in these lists, it may be conceded that several of them lack the autonomy necessary to bring them within the definition of "foreign country" contained in Article 382, Regulations 45, and succeeding Regulations containing an identical definition. These comparatively isolated departures in practice do not affect the administration or construction of Section 238 of the Revenue Act of 1921. They do not show a substantial disregard of the definition of the same phrase in another connection. So far as they are relevant at all they are, in effect, further manifestations of an inept choice of examples, but they do not enlarge or restrict the general definition. The definition embodied in Article 382 of Regulations 62 has been adhered to in theory and we believe that it has been consistently applied under Section 238.

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[1] Article 66, Regulations 65, and Article 89, Regulations 69, relating to Section 213 (b) (8) of the Revenue Acts of 1918 and 1919 (U. S. C. Title 26, sec. 954, and U. S. C. Supp. [illegible] sec. 954); Articles 1042 and 1102, Regulations 74, under the Revenue Act of 1926.

In a ruling made October 18, 1919, Solicitor's Memorandum 1187, not reported (Appendix B, *infra*, p. 28) it was held that a canton of Switzerland was not a sovereign state so as to be classified as a country. It was said:

> In the absence of some qualifying phrase, the word "country" in the revenue laws of the United States has always been held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country," but a part of a "country." * * *

It was likewise ruled that the Province of British Columbia in the Dominion of Canada was not a foreign country within the meaning of Sections 222, 234 (a) (3), and 238 of the Revenue Act of 1918, and Article 382 of Regulations 45. Office Decision 1050, Cumulative Bulletin 5 (Jul.–Dec., 1921), p. 194 (Appendix B, *infra*, p. 30). It has also been ruled that Tasmania, South Australia, Western Australia, and New South Wales, being constituent states of the Commonwealth of Australia, are not foreign countries. Solicitor's Memorandum 1614, III–1, Cumulative Bulletin (Jan.–June, 1924), p. 227 (Appendix B, *infra*, p. 31).

Thus the administrative construction of the phrase "foreign country" as used in Section 238 of the Revenue Act of 1918 and in the similar provisions of subsequent acts limits it to sovereign states and self-governing colonies. So

far as we have been able to ascertain the practice under this section has uniformly followed this construction. While the phrase construed has a well-settled meaning which is in accordance with the construction, it might perhaps have been defined so as to have a somewhat wider application. It was therefore open to construction by the administrative officers. The long and consistent administrative construction was certainly an admissible one, and it is not to be overruled unless plainly wrong. *Universal Battery Co.* v. *United States,* 281 U. S. 580, 583; *Fawcus Machine Co.* v. *United States,* 282 U. S. 374, 378. The reenactment of the same provision without substantial change imports legislative approval of the administrative construction. *Brewster* v. *Gage,* 280 U. S. 327, 337; *Poe* v. *Seaborn,* 282 U. S. 101, 117; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492.

The administrative construction of the phrase "foreign country" is supported by several decisions and is consistent with its meaning when used in other Federal statutes and in international law.

In *Stairs* v. *Peaslee,* 18 How. 521, construing a provision of the Tariff Act of March 5, 1851, c. 38, 9 Stat. 629, this Court adopted the following definition of "country" (p. 526):

> * * * the word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State however widely separated,

> which are subject to the same supreme executive and legislative control. The question was brought before the treasury department in 1817; and, on the 29th of September in that year, instructions were issued by the department, in a circular addressed to the different collectors, in which the construction above stated is given to the word. The practice of the government has ever since conformed to this construction; and it must be presumed that congress, in its subsequent legislation on the subject, used the word according to its known and established interpretation.
>
> Apart, however, from this consideration, we regard the construction of the treasury department as the true one. Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged.

This construction of "country," as embracing "all the possessions of a foreign State" was quoted with approval in *Faber* v. *United States,* 221 U. S. 649, 658. See also *United States* v. *The Ship Recorder,* 1 Blatchford 218 (S. D. N. Y.).

In the court below respondent relied on *Pearcy* v. *Stranahan,* 205 U. S. 257. In that case the question was whether by the treaty with Spain the Isle of Pines became a part of the United States. It was held "foreign country" so as to subject to duty articles brought therefrom into the United States, but this was because it was under the juris-

diction and sovereignty of the Republic of Cuba (p. 272). This decision is not inconsistent with *Stairs* v. *Peaslee, supra.* The same is true of *DeLima* v. *Bidwell,* 182 U. S. 1, and *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, in which it was held that, after the treaty of peace with Spain, Porto Rico and the Philippine Islands became territory of the United States. In the latter case this Court said (p. 179), "The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country." It is clear that neither the Philippines nor Porto Rico, considered separately, was regarded by this Court as having been a "foreign country" prior to the treaty, but each was regarded as a part of the country of Spain. Cf. *United States* v. *Rice,* 4 Wheat. 246.

The term "foreign country" appears in certain statutes relating to the foreign service of the United States where it is apparent Congress uses it in reference to foreign states or governments in the sense of international persons, *e. g.,* Act of February 5, 1915, c. 23, 38 Stat. 807, Sec. 7 (U. S. C., Title 22, Sec. 38); Act of June 14, 1878, c. 193, 20 Stat. 131 (U. S. C., Title 22, Sec. 177); Act of June 4, 1920, c. 223, 41 Stat. 751, Sec. 4 (U. S. C., Title 22, Sec. 216); Act of April 29, 1926, c. 195, 44 Stat. 333, Title I (U. S. C. App., Title 22, Sec. 291).

The definition of foreign country contained in Article 382, Treasury Regulations 62 (*infra*, p. 25), is consistent with the definition adopted in *Stairs* v. *Peaslee, supra; Faber* v. *United States, supra;* and *United States* v. *The Ship Recorder, supra.* The term "country" is used in the same sense to define a state or person in international law. Hyde, International Law, Vol. I, pp. 16–17; Moore, International Law Digest, Vol. I, pp. 14–18, and authorities cited; Hall, International Law, p. 17, *et seq.;* Wheaton, International Law, 6th Ed., Vol. 1, pp. 38 *et seq.*

The respondent contended in the court below that the administrative construction of the phrase "foreign country," in Section 238 of the Revenue Act of 1918, was too narrow to be consistent with the purpose of the statute. It was argued that Congress intended by Section 238 to relieve American business from the burden of all double taxation upon income resulting from foreign taxes and that there is no room, within the general purpose of the law, for an interpretation of Section 238 which excludes a credit for any tax upon income exacted by any political subdivisions of a foreign country.

An examination of the legislative history of the Revenue Act of 1918 and the subsequent acts containing provisions similar to Section 238 in the 1918 Act does not disclose any authoritative declaration as to the meaning of the phrase "foreign country" used in Section 238 and in subsequent

legislation of the same character. While the purpose of Congress in enacting Section 238 was undoubtedly to relieve against some of the burdens of double taxation, there is nothing in the legislative history to show that Congress intended to relieve against all such burdens. In these circumstances the administrative construction acquiesced in by Congress for many years should be regarded as furnishing a safe guide to the legislative intent.

Relief from international double taxation has been the subject of international negotiation, and the nature and scope of those negotiations indicate that the nations generally have been concerned only with relieving their nationals from double taxation by sovereign states and not from that of political subdivisions.

The general conferences of experts on Double Taxation and Tax Evasion, held under the auspices of the League of Nations, were attended only by representatives of international states.[4] In their reports these experts embodied forms of treaties or conventions which were recommended in the interest of uniformity to relieve the burdens of double taxation.[5] These reports and the forms of

[4] Australia did not have a representative present, but there were representatives of Irish Free State and the Union of South Africa at the meeting held at Geneva in October, 1928.

[5] Report presented by General Meeting of Government Experts on Double Taxation and Tax Evasion, Geneva, April, 1927, League of Nations Publication C 216-M85, 1927 II; similar report of October, 1928, League of Nations Publication C 562-M178, 1928 II.

suggested treaties deal only with taxes imposed by the general governments of the several countries and do not refer to taxes imposed by constituent states, territorial subdivisions, municipalities, or colonies.'

The right to credit taxes paid to a foreign country is in the nature of an exemption, since the credit operates to reduce the amount of tax which would otherwise be payable. Its effect is to confer upon the taxpayer an extraordinary benefit. If there were any doubt about the intention of Congress, it should be resolved in favor of the Government *Cornell* v. *Coyne*, 192 U. S. 418, 431; *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 147; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.

There is no provision in the revenue acts which permits the crediting of taxes imposed by a State of the United States against income and profits taxes imposed by the United States. State taxes are deducted from gross income in computing net income, under Section 234 (a) (3) of the Revenue Act of 1921. It is not to be presumed that Congress

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'In a paper entitled "Double Tax Relief for Foreign Trade in the Revenue Act," published in National Income Tax Magazine, May, 1929, by Mitchell B. Carroll, it is stated that "By 'foreign country' is meant a sovereign state. In the case of a country such as Canada, the credit applies to the Dominion income tax but not to the income taxes levied by the Provinces." Mr. Carroll, formerly Chief of the Section of European Law and Taxes, U. S. Department of Commerce, attended the meetings on double taxation at Geneva as one of the American experts.

intended to allow credits to corporations for taxes paid to states or other subdivisions of foreign countries while withholding similar credits for taxes paid to States of the United States. It is more reasonable to infer that the purpose was to relieve the taxpayer from taxes imposed by another country sovereign in the same sense as is the United States, thus, in a measure, equalizing the taxes imposed upon the income of taxpayers, whether derived from domestic or from foreign investments. To have extended the exemption so as to allow the credit of taxes imposed by all subordinate subdivisions of a foreign country would have resulted in discrimination rather than equalization. No such intention can fairly be imputed to Congress, particularly when the discrimination would operate against domestic investments and in favor of foreign investments.

II

NEW SOUTH WALES IS NOT A "FOREIGN COUNTRY" WITHIN THE MEANING OF SECTION 238 (A) OF THE REVENUE ACT OF 1921

By the Commonwealth of Australia Constitution Act, 63 & 64 Victoria, c. 12 (see extracts, *infra*, pp. 33–42), New South Wales became a state of the Commonwealth of Australia. The position of New South Wales in the Commonwealth is analagous to that of a State in the United States. Indeed, it appears that the form of government of the United States was used as a pattern in fashioning the Con-

stitution of the Commonwealth.[8] That Constitution created the Commonwealth of Australia, a new entity, vested with exclusive power over certain matters, power coordinate with powers possessed by the constituent states over other matters and with paramount authority in case of conflict. Certain other powers remained with the states. (See Keith, Responsible Government in the Dominions, 2d Ed., Vol. II, pp. 605 *et seq.;* see also *Attorney General for the Commonwealth of Australia* v. *The Colonial Sugar Refining Co., Ltd.* [1914] A. C. 237.)

The parliament of the Commonwealth is granted, subject to the constitution, general powers, among others over trade and commerce with other countries and among the states; taxation; bounties on the production or export of goods; borrowing money; postal, telegraphic, telephonic, and other like services; the naval and military defense of the Commonwealth and of the several states; navigation; quarantine; currency, coinage, and legal tender; copyrights, patents, and trade marks; naturalizations and aliens; immigration and emigration; external affairs. (Section 51, *infra,* pp. 35–38.) It is provided that the Commonwealth shall protect every state against invasion and, on

[8] In *Attorney General For the Commonwealth of Australia* v. *The Colonial Sugar Refining Co., supra,* it is said (p. 254), "In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada."

the application of the executive of the state, against domestic violence. (Section 119.)

The former colonies which agreed to unite in the federal Commonwealth under the constitution are defined as states, "and each of such parts of the Commonwealth shall be called 'a State'." (Par. 6, Constitution Act, *infra*, p. 34.) In referring to powers reserved to the states, the constitution speaks of "a Colony which has become or becomes a State." (Sections 107, 108.)

It is apparent from these constitutional provisions that New South Wales is not a sovereign state, except in the limited sense in which a State of the United States is a sovereign State. It is not permitted to have relations with states outside of the Commonwealth. Westlake, International Law, Part I, p. 2.[1] It is not, we submit, a state in the sense of international law (see authorities cited, *supra*, p. 13), and does not come within the term "foreign country" as that phrase is used in Section 238 of the Revenue Act of 1921.

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[1] Westlake says (International Law, Part I, p. 2), "The original components of the United States of America, as Massachusetts and New York, became states of international law when they won their independence, but since by the terms of their union they have lost both the possibility of foreign relations and even complete supremacy at home, the name of state has been retained by them only as a memory. In the Australian Commonwealth the name is not even a memory. There the parts, as New South Wales and Victoria, have always been included in the British dominions, and have now received the name of state by way of compliment. * * *"

While the opinion of the court below proceeds upon the broad ground that Section 238 permits credit for income taxes paid to any foreign government, whatever its form or degree of sovereignty, that court also concluded that New South Wales was a self-governing colony. We submit, however, that New South Wales is not a "self-governing colony" within the meaning of Article 382 of Regulations 62, *infra*, p. 25. This term undoubtedly is used as synonymous with "sovereign state" so as to embrace within "foreign country" the great self-governing dominions of the British Empire.

Under the conception which formerly prevailed among nations with scattered possessions, regarded as colonies without power to deal with their major affairs except through the administrative or legislative machinery of the nation to which they belonged, it is doubtful whether any colony or dominion of a sovereign state would have been recognized as a separate entity in international law, and probably none of them would have been a "foreign country" within the definition with which we are dealing. Formerly Australia and Canada were not regarded as sovereign states or countries but were considered as parts of Great Britain. This was the position of Nova Scotia in 1855, at the time of the decision in *Stairs* v. *Peaslee, supra.* Nova Scotia then was a colony with a certain measure of self-government (Keith, Responsible Government in the Dominions, Vol. I, pp. 6, 19, 507) and was

held in *Stairs* v. *Peaslee* to be a part of the country of Great Britain.

In later times, however, an international status has developed for the British Dominions.[10] It has gradually been recognized that a new form of state has emerged in international law which, having nearly all, if not all, of the attributes of sovereignty, was able to attain a place of virtual independence among the family of nations while remaining a constituent part of the British Commonwealth of Nations. This development received international recognition in 1912, when the dominions were separately represented at the Conference on Radio Telegraphy. After the Great War the Commonwealth of Australia and the other dominions participated in the Peace Conference of 1919, the Treaty of Versailles with Germany was signed for each by its own representatives, and they were accepted as original members of the League of Nations. In 1927 Canada was elected a member of the Council of the League. The dominions may now be represented diplomatically in foreign countries and receive such representatives. (Wheaton's International Law, Vol. I, 6th Ed. (1929), pp. 129–133; Hyde, International Law, p. 87, note 3.) While it is true that Australia, New Zealand, and Canada are within the Commonwealth of British Nations, under the modern conception of these entities they are international states, and hence they are countries within

[10] See International Conciliation, Bulletin No. 228, March, 1927, on the British Commonwealth of Nations.

the meaning of Section 238 and Article 382 of Regulations 62. It may be that such dominions are in a sense self-governing colonies, but to say that they are not international states is to ignore their present relation to Great Britain and the other nations.

However these dominions may be classified, it seems clear that New South Wales is neither an international sovereign state nor a self-governing colony within the ordinary definition of these terms. It is no longer merely a colony of Great Britain. Its relation to the Commonwealth of Australia is as a constituent part of the federal union. It is not "self-governing" except in those matters as to which authority is not vested in the Commonwealth. The administrative rulings under the regulations have failed to recognize New South Wales as a self-governing colony and we submit that they are correct and should not be disturbed.

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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DECEMBER, 1931.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 249, 254, 258:

SEC. 238. (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided*, That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term "net income," as used in this subdivision means net income as defined in sections 245 and 246, respectively.

* * * * *

(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation

from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided,* That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term "accumulated profits" when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise); and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an

accounting period of less than one year, the word "year" as used in this subdivision shall be construed to mean such accounting period.

SEC. 213. That for the purposes of this title * * * the term "gross income"—

* * * * *

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(8) The income of a nonresident alien or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States; * * *

SEC. 222. (a) That the tax computed under Part II of this title shall be credited with:

(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States; and

(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

(3) In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; * * *

SEC. 234 (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(3) Taxes paid or accrued within the taxable year except (a) income, war-profits, and excess-profits taxes imposed by the authority of the United States, (b) so much of the income, war-profits and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit under section 238, * * *

Treasury Regulations 62:

ART. 611. *Credit for foreign taxes.*— * * * For the meaning of the terms used in section 238 of the statute see section 2 and article 382. * * *

ART. 382. *Meaning of terms.*—"Amount of * * * taxes paid during the taxable year" means taxes proper (no credit being given for amounts representing interest or penalties) paid or accrued during the taxable year on behalf of the individual claiming credit. "Foreign country" includes within its meaning any foreign sovereign state or self-governing colony (for example, the Dominion of Canada), but does not include a foreign municipality (for example, Montreal) unless itself a soverign state (for example, Hamburg). "Any possession of the United States" includes, among others, Porto Rico, the Philippines, and the Virgin Islands. As to the meaning of "sources" see section 217. See also section 2 of the statute.

ART. 385. *Countries which do or do not satisfy the similar credit requirement.*—(a) The following is an incomplete list of the countries which satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1921, either by allowing to the citizens of the United States residing in such countries a credit for the amount of income, war profits, or excess profits taxes paid to the United States, or in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such countries: Bulgaria, Canada, Italy, Newfoundland, Salvador. (b) The following is an incomplete list of the countries which do not satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1921, either by allowing no credit to citizens of the United States residing in such countries, for the amount of income, war profits, or excess profits taxes paid to the United States, or because such countries do not impose any income, war profits, or excess profits taxes: Argentina, Bahama, Belgium, Bermuda, Bolivia, Bosnia, Brazil, Chile, China, Costa Rica, Dutch Guiana, Ecuador, Egypt, Finland, France, Great Britain and Ireland, Guatemala, Herzegovina, India, Jamaica, Japan, Montenegro, Morocco, New Zealand, Nicaragua, Panama, Paraguay, Persia, Peru, Portugal, Rumania, Santo Domingo, Serbia, Siam, Straits Settlements, Sweden, Switzerland, Venezuela. The former names of certain of these territories are here used for convenience in spite of the actual or possible change in the name or sovereignty. A resident of the United States who is a citizen or subject of any country in the first list

is entitled, for the purpose of the total tax due the United States for 1921 (as to fiscal years beginning in 1920, see art. 386) and subsequent years, to a credit for the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country. If he is a citizen or subject of any country in the second list, he is not entitled to such credit. If he is a citizen or subject of a country which is in neither list, then to secure the desired credit he must prove to the satisfaction of the Commissioner that his country satisfies the similar credit requirement of the statute.

APPENDIX B

SOLICITOR'S MEMORANDUM NO. 1187

INCOME TAX: SECTION 216 (e), REVENUE ACT OF 1918

(A Canton of Switzerland is not a "country" within the meaning of Section 216 (e), Revenue Act of 1918)

OCTOBER 18, 1919.

INCOME TAX UNIT:

Upon a careful reconsideration of the question as to whether the Cantons of Switzerland are sovereign states so as to be termed countries within the meaning of the similar credit requirement of Section 216 (e) of the Revenue Act of 1918, it is believed that office memorandum dated May 6, 1919, suggesting a letter to the Swiss Minister, holding that the Cantons of Switzerland are sovereign states should be overruled.

Section 216 (e) of the Revenue Act of 1918 provides:

> In the case of a nonresident alien individual who is a citizen or subject of a country which imposes an income tax, the credits allowed in subdivisions (d) and (e) shall be allowed only if such country allows a similar credit to citizens of the United States not residing in such country.

In International Law the word "country" is synonymous with the words "nation" or "state." "The term 'country' seems to be well understood,

and commonly signifies the state of which one is a member; in a more confined sense, the state, or even more particularly the term or place of one's birth * * *. Its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word is employed to denote the population, the nation, the state, the government having possession and dominion over the country." (15 Corpus Juris, 670. See also Vattel, Law of Nations, Chap. XIX, Sec. 122; Dicey, Conflict of Laws, 2nd ed., p. 69; *U. S.* v. *Recorder* 27, Fed. Cas. 718).

In the absence of some qualifying phrase, the word "country" in the revenue laws of the United States has always been held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country," but a part of a "country." "Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged." (*Stairs* v. *Peaslee,* 18 How. 521, 526; see also *Campbell* v. *Barnes,* 4 Fed. Cas. 2354; *Faber* v. *U. S.,* 221 U. S. 649.)

In Wheaton International Law, 5th ed., p. 73–86, it is said:

> In 1874 the Swiss Constitution was again revised, and some serious changes were made. The power of the Federal Government was greatly strengthened, and the maintenance and control of the army was conferred upon it. Switzerland has now

ceased to be a system of confederated states ("Staatenbund"), and has become as "compositive" State ("Bundesstat"). (See also Woolsey International Law, Sec. 37, 16 Ruling Case Law, 101.)

It is concluded, therefore, that the Cantons of Switzerland do not constitute sovereign states, but rather that the Federal Government of Switzerland is a compositive State, taking in all the Cantons.

* * * * *

(Signed) ROBERT N. MILLER,
Solicitor of Internal Revenue.

OFFICE DECISION NO. 1050

(C. B. 5, p. 194)

39–21–1844
O. D. 1050

Section 222, Article 382: Meaning of terms. (Also Section 214 (a) 3, Article 131.)

The term "foreign country" as used in sections 238 (a) and 234 (a) 3 of the Revenue Act of 1918 is held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country" but a part of a "country." The Province of British Columbia, therefore, does not come within the meaning of the term "foreign country" as contemplated by the statute.

Amounts of mineral tax and income tax paid or accrued to the Province of British Columbia by a domestic corporation are deductible as business expenses from the taxable income of the corporation.

SOLICITOR'S MEMORANDUM NO. 1614

(C. B: III–1, p. 227)

Article 382: Meaning of terms. III–12–1433
S. M. 1614

Revenue Act of 1918:

> Tasmania, South Australia, Western Australia, and New South Wales are not "foreign countries" within the meaning of section 238 (a) of the Revenue Act of 1918, but are subdivisions of the Commonwealth of Australia.
>
> The Union of South Africa is one of the self-governing colonies of the British Empire and comes within the definition of "foreign country."
>
> The tax of the Italian Government known as "richezza mobile" is held to be a personal property tax, for which a claim for credit may not be allowed. The tax is, however, deductible as a business expense.

Among the foreign countries to which the M corporation paid income and profits taxes and for which it seeks credits are Tasmania, South Australia, Western Australia, New South Wales, and Union of South Africa.

In Office Decision 1050 (C. B. 5, p. 194) it was held:

> That the term "foreign country" as used in sections 238 (a) and 234 (a) 3 of the Revenue Act of 1918 is held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions in this sense is not a "country" but a part of a "country." The Province of British Columbia, therefore, does not come within the meaning of the term "foreign country" as contemplated by the statute.

> Amounts of mineral tax and income tax paid or accrued to the Province of British Columbia by a domestic corporation are deductible as business expenses from the taxable income of the corporation.

Tasmania, South Australia, Western Australia, and New South Wales are subdivisions of the self-governing British possession, the Commonwealth of Australia, and, therefore, in view of Office Decision 1050, the claims for credit for income taxes paid to these countries should be disallowed. However, in view of this same decision, these items are deductible as business expenses from the taxable income of the company. In the case of the income tax paid to the Union of South Africa, the claim for credit should be allowed. Article 382 of Regulations 62 provides in part as follows:

> "Foreign country" includes within its meaning any foreign sovereign State or self-governing colony (for example, the Dominion of Canada).

The Union of South Africa is one of the self-governing colonies of the British Empire. Its relation to the British Empire is similar to that of Canada. Its subdivisions are the Cape of Good Hope, Orange Free State, Natal, Transvaal, and Southwest Africa. It has its own government and its legislative power rests with a senate and a house of assembly.

Therefore, it is the opinion of this office that the Union of South Africa is a "foreign country" as contemplated by section 238 (a) of the Revenue Act of 1918.

* * * * * *

The claims for credit for income taxes paid to Great Britain, Norway, Spain, and France should be allowed.

APPENDIX C

(The following extracts are taken from Quick, "Legislative Powers, Commonwealth and States of Australia," pp. 115 to 913:)

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

(63 and 64 Victoria, c. 12)

An Act to constitute the Commonwealth of Australia

JULY 9, 1900.

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established;

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

* * * * *

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and

people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

6. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purpose of that Act.

9. The Constitution of the Commonwealth shall be as follows:

CHAPTER I.—THE PARLIAMENT

* * * * *

Part V.—Powers of the Parliament

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) Trade and commerce with other countries, and among the States;

(ii) Taxation; but so as not to discriminate between States or parts of States;

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;

(iv) Borrowing money on the public credit of the commonwealth;

(v) Postal, telegraphic, telephonic, and other like servies;

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

(vii) Lighthouses, lightships, beacons, and buoys;

(viii) Astronomical and meteorological observations;

(ix) Quarantine;

(x) Fisheries in Australian waters beyond territorial limits;

(xi) Census and statistics;

(xii) Currency, coinage, and legal tender;

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;

(xv) Weights and measures;

(xvi) Bills of exchange and promissory notes;

(xvii) Bankruptcy and insolvency;

(xviii) Copyrights, patents of inventions and designs, and trade marks;

(xix) Naturalization and aliens;

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) Invalid and old-age pensions;

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

(xxvii) Immigration and emigration;

(xxviii) The influx of criminals;

(xxix) External affairs;

(xxx) The relations of the Commonwealth with the islands of the Pacific;

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) Railway construction and extension in any State with the consent of that State;

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal

Judicature, or in any department or officer of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

* * * * *

CHAPTER II.—THE EXECUTIVE GOVERNMENT

* * * * *

69. On a date or dates to be proclaimed by the Governor General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:

Posts, telegraphs, and telephones:
Naval and military defense:
Lighthouses, lightships, beacons, and buoys:
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which

at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

* * * * *

CHAPTER IV.—FINANCE AND TRADE

* * * * *

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

* * * * *

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

* * * * *

98. The power of the Parliament to make laws with respect to trade and commerce extends to

navigation and shipping, and to railways the property of any State.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

* * * * *

CHAPTER V.—THE STATES

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

* * * * *

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

* * * * *

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any

disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

* * * * *

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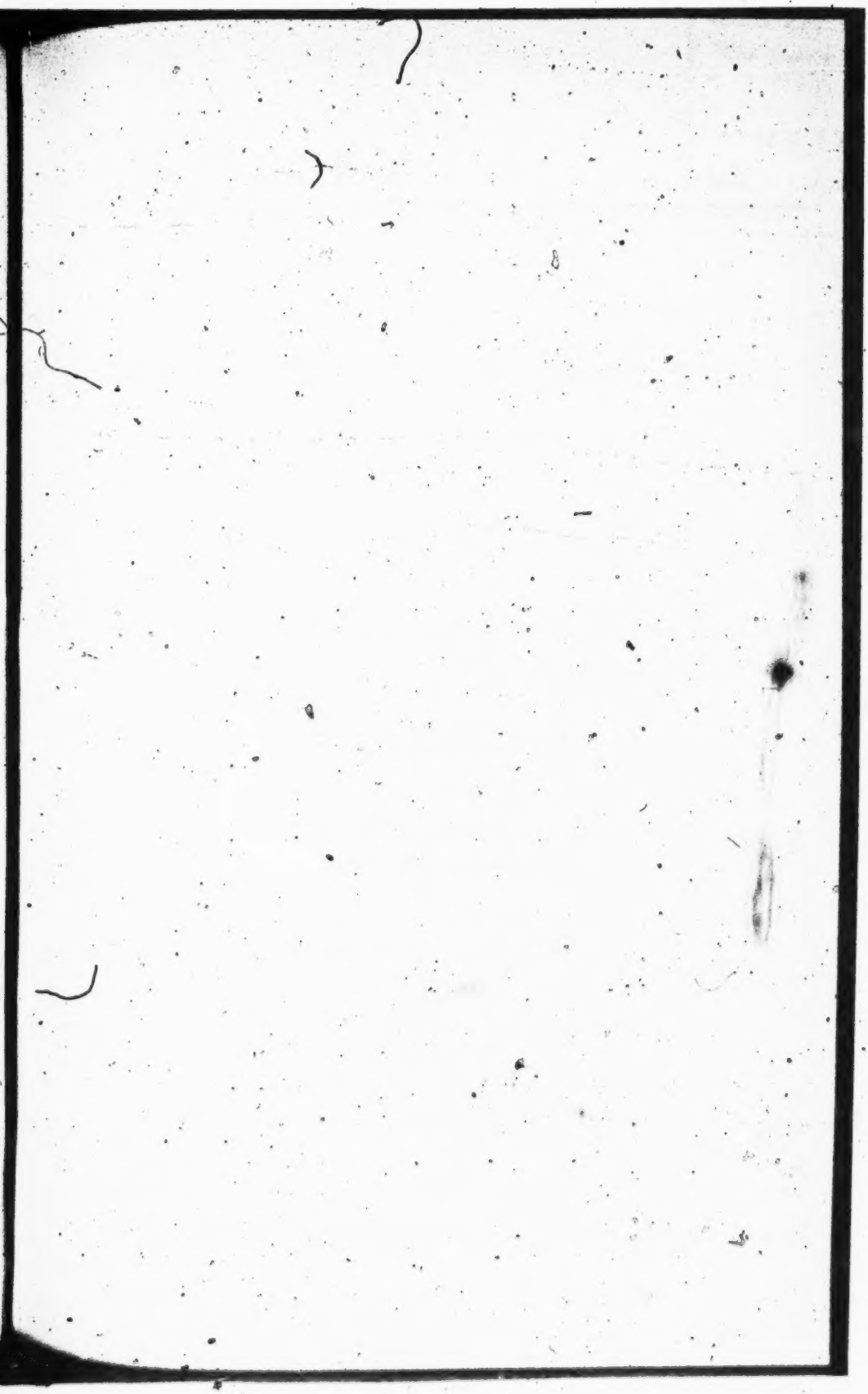

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 378

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

CHICAGO PORTRAIT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

ARNOLD R. BAAR,
ALBERT L. HOPKINS,
HERMAN T. REILING,
Counsel for Respondent.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

This is a proceeding originally instituted before the United States Board of Tax Appeals to review an additional tax of $1,919.59 proposed by the Commissioner of Internal Revenue against the Chicago Portrait Company for the calendar year 1923. The decision of the Board (R. 16-22), reported in 16 B. T. A. 1129, and the decision of the Circuit Court of Appeals for the Seventh Circuit (R. 38-42), reported in 50 Fed. (2d) 683, were in favor of the Chicago Portrait Company.

The facts, which were stipulated below, may be summarized as follows (R. 14-16):

During the calendar year 1923, the taxpayer, an Illinois corporation was the owner of 51 per cent of the voting stock of and received dividends from the International Art Company, of Sydney, Australia, a foreign corporation. During the same year, the Australian corporation paid income taxes to the Commonwealth of Australia, to the Dominion of New Zealand, and to the State of New South Wales. The Commissioner included the dividends received from the Australian corporation in the gross income of the taxpayer for the year 1923, credited the taxes paid to the Commonwealth of Australia and the Dominion of New Zealand, but refused to allow as a credit any part of the income taxes paid by the Australian corporation to the State of New South Wales.

THE ISSUE.

THE SOLE QUESTION IS WHETHER NEW SOUTH WALES IS INCLUDED IN THE PHRASE "ANY FOREIGN COUNTRY" WITHIN SECTION 238 OF THE REVENUE ACT OF 1921.

Statute Involved.

"SEC. 238 (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States; *Provided*, That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit it taken, which the taxpayer's net income (computed without deduction for any income, war-profits, and excess-profits taxes

imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term 'net income,' as used in this subdivision means net income as defined in Sections 245 and 246, respectively.

* * * * * *

(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided,* that the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term 'accumulated profits' when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war profits, and excess-profits

taxes of which are determined on the basis of an accounting period of less than one year, the word 'year' as used in this subdivision shall be construed to mean such accounting period."

SUMMARY OF ARGUMENT.

I. Section 238 of the Revenue Act of 1921 means that all income and profits taxes paid to taxing authorities foreign to the United States may be taken as credits, subject only to the limitations provided in that section.

1. The statute must be interpreted in the light of the purpose sought to be accomplished and the intention of Congress.

Smythe v. *Fiske,* 23 Wall. 374, 380.
Hamilton v. *Rathbone,* 175 U. S. 414, 419.
Hawaii v. *Mankichi,* 190 U. S. 187, 212.
Stewart v. *Kahn,* 11 Wall. 493, 504.
Barrett v. *VanPelt,* 268 U. S. 85, 90.

2. The Congressional purpose was (a) to relieve double taxation, and (b) to increase the revenue by discouraging American business concerns from separating their foreign activities into foreign corporations whose incomes could not be taxed until actually brought into this country.

Hearings before Ways and Means Committee under Act of 1918, p. 649.
Report of Ways and Means Committee on Act of 1918, p. 11.
Report of Ways and Means Committee on Act of 1921, p. 8.
Conference Committee Report on Act of 1921, p. 38.

3. To make the right to the credit contingent on the international rank of the foreign tax collecting authority, as the Government urges, defeats the purpose of the Act.

Conference Committee Report on Act of 1918, p. 53.

Report of Ways and Means Committee on Act of 1918, p. 11.

II. New South Wales is a foreign country within the meaning of Section 238 of the Revenue Act of 1921.

1. The word "country" in the phrase "any foreign country" means any foreign tax-levying authority.

Dicey's Conflict of Laws, 4th Ed., pp. 59, 60.

Campbell v. *Barney,* 4 Fed. Cas. 1157.

Mensevich v. *Tod,* 264 U. S. 134.

Seif v. *Nagle,* 14 F. (2d) 416.

United States v. *Smith,* 2 Fed. (2d) 90.

In re Farez, 8 Fed. Cas. 1011.

Pagano v. *Cerri,* 93 Ohio St. 345.

In re Ghio's Estate, 157 Cal. 552.

Mansell's Adm'x v. *Israel,* 6 Ky. 510.

Hendrie Mfg. Co. v. *Pendrick,* 21 Hawaii 258.

2. The Government's interpretation of the term "foreign country" is based on a misapplication of some of the older tariff decisions, but the fact is that there is no uniform definition of the term even in the particular field of tariff legislation.

Pearcy v. *Stranahan,* 205 U. S. 257, 269.

Stairs v. *Peaslee,* 18 Haw. 521.

Faber v. *United States,* 221 U. S. 649.

United States v. *The Ship Recorder,* 1 Blatchford 218.

3. Status of New South Wales.

Vol. 10, The Laws of England (1909), by Earl of Halsbury, pp. 508, 519.

Attorney General for Commonwealth of Australia v. *The Colonial Refining Co.* (1914) A. C. 237.

Bryce, Modern Democracies (1927), Vol. II, p. 177.

Allen, The Evolution of Governments and Laws (rev. ed., 1922), p. 126.

4. The tax in question was levied pursuant to power delegated to New South Wales by the United Kingdom of Great Britain and Ireland.

Meyers v. *United States,* 140 Fed. 648.

Vol. 10, The Laws of England (1909), by the Earl of Halsbury, p. 542.

Keith, Responsible Government in The Dominions, (2d Edition, 1928), Vol. II, p. 620.

1 Oppenheim International Law (3d Edition, 1920) p. 160.

5. The Regulations of the Treasury Department have adopted a construction of the word "country" and of the term "foreign sovereign state or self-governing colony" which would include New South Wales.

Article 382, Regulations 62.

Article 385, Regulations 62.

Article 307, Regulations 45.

Article 89, Regulations 69.

S. M. 1614, III—1 C. B. 227.

S. M. 1187.

O. D. 1050, 5 C. B. 194.

Attorney General for the Commonwealth of Australia v. *The Colonial Sugar Refining Co.* (1914) A. C. 237.

III. There was no consistent construction of the term "foreign country" by the Bureau of Internal Revenue.

Article 8, Regulations 33.

Article 8, Regulations 33 (Rev.).

Article 382, Regulations 45 (First Edition).

Report of the Ways and Means Committee on Act of 1918, p. 11.

Report of Conference Committee on Act of 1918, p. 60.

Article 382, Regulations 45 (1920 Ed.).

Report of Secretary of Treasury (1919), p. 1102.

Iselin v. *United States,* 270 U. S. 245, 251.

The Dollar Savings Bank v. *United States,* 86 U. S. 227, 237.

Missouri Pac. R. Co. v. *Hellmich,* 12 Fed. (2d) 978.

United States v. *Rodenbaugh,* 21 Fed. (2d) 781, 785.

ARGUMENT.

I.

SECTION 238 OF THE REVENUE ACT OF 1921 MEANS THAT ALL INCOME AND PROFITS TAXES PAID TO TAXING AUTHORITIES FOREIGN TO THE UNITED STATES MAY BE TAKEN AS CREDITS, SUBJECT ONLY TO THE LIMITATIONS PROVIDED IN THAT SECTION.

Section 238 of the Revenue Act of 1921 grants to certain corporation-taxpayers what is popularly called the "credit for foreign taxes." A similar credit is granted to individuals by Section 222 of the same Act. By this credit the taxpayer may offset against the tax that would otherwise be due the United States the amount of income, war profits, and excess profits taxes paid during the year "to any foreign country." Section 238 (e) allows certain domestic corporations having a foreign subsidiary to take a similar credit for such taxes paid by the foreign subsidiary "to any foreign country." The Commissioner of Internal Revenue, the petitioner before this Court, denied the credit taken by the respondent for taxes paid to New South Wales by its foreign subsidiary upon the ground that New South Wales does not come within the phrase "any foreign country."

The Commissioner of Internal Revenue in his brief before this Court contends that New South Wales is not an international sovereignty or self-governing colony and that for this reason it does not come within the term "any foreign country."

The respondent contends that the purpose of Congress in enacting Section 238, the long established ad-

ministrative interpretation of the term "foreign country," and the legal meaning of the term, show that international statehood or sovereignty is not the test.

1. *The Statute Must Be Interpreted in the Light of the Purpose Sought to Be Accomplished and the Intention of Congress.*

The rule is well settled that statutes are to be construed in the light of the purpose sought to be accomplished and in such a manner as to give effect to the intent of Congress. Among the numerous cases supporting this rule, see *Hamilton* v. *Rathbone,* 175 U. S. 414, 419; *Hawaii* v. *Mankichi,* 190 U. S. 197, 212; *Stewart* v. *Kahn,* 11 Wall. 493, 504; *Barrett* v. *Van Pelt,* 268 U. S. 85, 90; *Smythe* v. *Fiske,* 23 Wall. 374, 380.

2. *The Congressional Purpose was (a) to Relieve Double Taxation, and, (b) to Increase the Revenue by Discouraging American Business Concerns from Separating Their Foreign Activities Into Foreign Corporations Whose Incomes Could Not Be Taxed Until Actually Brought Into This Country.*

Since the jurisdiction of the United States to levy income and/or profits taxes on its citizens permits the federal tax to be based on foreign as well as domestic income, it is obvious that there is a double tax burden where the United States taxes such foreign income and the foreign country in which the income is earned likewise levies an income or profits tax. The foreign income in such cases is subject both to the foreign tax and to our federal tax. The federal revenue acts before the war granted a measure of relief by permitting the foreign income tax to be *deducted* from *gross income* in determining the net income subject to the fed-

eral income tax. With the low tax rates then obtaining under the federal revenue acts and in foreign countries, this method of relief was adequate.

The deductions of a corporation under the Revenue Act of 1913 (Act of October 3, 1913, 38 Stat. 114, 166 173), included "all sums paid by it within the year for taxes imposed * * * by the Government of any foreign country," (Paragraph G (b) (fourth)), and under the Revenue Act of 1916 (Act of September 8, 1916, 39 Stat. 756, 767, 769) "taxes paid within the year imposed by authority of * * * any foreign country. * * *." (Sec. 12 (a)). It was the Treasury practice under these prewar acts to permit the deduction of all foreign taxes, including, for example, a tax paid to New South Wales. Reg. 33, Art. 8:

> "*Third.* Taxes: State, or any political subdivision thereof, Federal or foreign (except income and excess profits taxes paid to the United States), and not including taxes assessed against local benefits."

Subsequent to the Revenue Act of 1917, new Regulations were adopted, No. 33 Revised. This same section was carried forward into the Revised Regulations.

The World War placed a tremendous fiscal burden on most of the governments of the world, which was reflected immediately by the imposition of income and profits taxes at extraordinarily high rates.

One result of these extraordinarily high tax rates in this country and throughout the world was to increase the double tax burden on foreign income of American corporations to a point where it became unendurable and amounted as a practical matter to confiscation of the foreign income. The natural defense against such confiscation was for Americans to segregate their foreign businesses in the form of separate foreign corpo-

rations, with the result that though the income of such foreign corporations was taxable by the foreign country, it would not be subject to tax by the United States. Thus the unbearable burden of double taxation at high rates might be alleviated by the action of the taxpayers themselves.

The Government, however, was opposed to separate foreign incorporation for a number of reasons, an important reason being that the inevitable result was a substantial loss of revenue to the United States. The following testimony produced in the hearings before the Ways and Means Committee under the Revenue Act of 1918 (at p. 649) shows the considerations which were urged upon Congress by American industry having interests abroad:

> "Now, the proposal is that income derived by American corporations from sources abroad—from operations entirely abroad—or from investments entirely abroad, be either exempted altogether from income and excess-profits taxes or at least that some preferential rate be given. Now, it may appear that I am asking you gentlemen who are engaged in the task of increasing revenues, to diminish revenues, but an examination of the subject has convinced me and I think, if you will follow me carefuly, it will convince you gentlemen, that if we continue to impose a heavy income tax, and especially a heavy excess-profits tax on American corporations operating abroad, our sources of revenue, not only the national revenue, but the State revenue, are going to be diminished, because the first effect will be that these corporations will be compelled to give up their American charters and will be compelled to seek incorporation in foreign jurisdictions, naturally in the place where they are doing business, and in that way this Government is going to lose that revenue from those corporations.
>
> The States are going to lose the revenue from them that they now derive from the organization and the license fees and taxes, and we are going

to lose a great deal of control over the corporations. That is practical, hard, business from the standpoint of taxation.

From the standpoint of American foreign trade the consequences are far greater. It would be a tremendous loss of prestige to the United States, to our foreign trade, if these companies had to give up their American charters. * * *"

Congress proceeded to meet the situation by permitting the foreign tax to be credited against the American tax, as heretofore explained. In the report of the Ways and Means Committee on the 1918 Act (Report No. 767 to accompany H. R. 12863, 65th Congress, Second Session, p. 11), it was stated:

"Under existing law a citizen of the United States can only deduct income, war or excess profits taxes paid to a foreign country from gross income in computing net income. *With the corresponding high rates imposed by certain foreign countries the taxes levied in such countries in addition to the taxes levied in the United States upon citizens of the United States place a very severe burden upon such citizens.* The bill provides that a credit against the income tax imposed in the United States be allowed a citizen of the United States subject to income and war or excess profits taxes *in* a foreign country of an amount equal to the tax paid in such country upon income that is received from sources within such country." (Italics supplied.)

The same problem was before Congress in the Revenue Act of 1921, at which time it was again urged that the protection of our foreign trade and keeping our foreign business under American charters necessitated the complete exemption of foreign traders from the extraordinarily high tax rates in the federal revenue act. The House of Representatives went so far as to allow what in substance amounted to exemptions to American citizens and corporations on income from foreign trade. The purpose was explained in the report of the Ways

and Means Committee on the 1921 Act (at p. 8) as follows:

> "Under existing law an American citizen or domestic corporation is taxed upon his or its entire income even though all of it is derived from business transacted without the United States. This results in double taxation, places American business concerns at a serious disadvantage in the struggle for foreign trade, and encourages American corporations doing business in foreign countries to surrender their American charters and incorporate under the laws of foreign countries. In order to remedy this situation foreign traders and foreign trade corporations, as above defined, under this bill (sec. 223) will be taxed substantially as nonresidents—*i. e.*, only on income received from sources within the United States."

The House provision did not become law, but the credit for foreign taxes against the American tax was continued subject to certain statutory limitations.

It is apparent, therefore, that the provisions for the crediting of foreign taxes were not written into the law as a gratuitous exemption to certain classes of taxpayers, but rather for the very practical reason of preventing the drying up of foreign income as a source of federal taxes and for the purpose of stimulating our foreign trade. The same purpose is evident in sub-section (e) of section 238, which encourages concerns already separately incorporated in foreign countries to distribute their earnings to the American parent corporations in the United States so as to subject the dividends to our federal tax.

The handling of the problem by means of a credit for foreign taxes had the advantage of permitting the highly progressive corporate and individual rates to be applied to the entire net income. The report of the Con-

ference Committee on the Act of 1921 (at p. 38) contains the following:

> "Amendment No. 436: The House bill provided for the exclusion from income of all dividends received from a corporation. Senate amendments agreed to by the conferees having provided for the inclusion in gross income of certain dividends received from a foreign corporation, Senate amendment No. 436 provides, under proper safeguards, for the credit by a domestic corporation of taxes paid by its subsidiary foreign corporation with respect to the income or profits of the foreign corporation paid as taxable dividends to the domestic corporation; and the House recedes."

The credit system had the further advantage of granting no direct credit against the tax on income derived from foreign countries which imposed *no taxes on income or profits,* whereas the exemption plan would have deprived the United States of all revenue, even in countries where there was no income or profits tax. Finally, the credit system as distinguished from that of exempting foreign income had the very great practical advantage of obviating the necessity of dividing items of income, expense and invested capital between domestic business and foreign business, which would have proved, of course, to be an exceedingly difficult allocatoin.

In short, to relieve an unbearable burden of double taxation and at the same time to retain and protect our own foreign trade and to make the income therefrom subject to American taxation, Congress adopted, through the credit system, a device which goes some way toward abating the American tax on income from sources within foreign countries when such countries actually subjected such income to income and/or profits taxes. The system of crediting foreign taxes inaugurated in the 1918 Act was re-enacted, without substantial change, in the 1921 Act, the Act involved in the present case.

The interests of the United States were fully safeguarded by the limitations in the statute (sec. 238 (a)) which restrict the amount of the credit to that percentage of the Federal tax which the foreign income bears to the combined foreign and domestic income. If the American corporation conducts its foreign business through a subsidiary, as in the present case, the even more strict limitations of subdivision (e) apply. Obviously, therefore, the credit does not exempt any American income from Federal taxation nor does not diminish the effective tax rate on the American income. It may be noted in passing that this disposes of the Government's contention that the Act should be construed against the taxpayer because it is asking for an exemption from the common burden of taxes. The fact is that the taxpayer is placed on the basis of the common tax burden borne by all industry throughout the United States. In some instances, of course, especially where the foreign business is done through a subsidiary, the statutory limitations operate in such a manner that the credit will not even wholly eliminate the double taxation of *foreign* income. In general, the credit tends to alleviate the burden of double taxation on foreign income, but the relief goes no further.

It is obvious that the Congressional intent and purpose outlined above can be given effect only by treating as foreign countries any foreign authority which actually levies and collects income and/or profits taxes, including, of course, such taxing authorities as the government of New South Wales.

3. *To Make the Right to the Credit Contingent on the International Rank of the Foreign Tax Collecting Authority, as the Government Urges, Defeats the Purpose of the Act.*

The extent of the hardship or confiscation to the taxpayer and loss of revenue to the Government does not depend upon the political organization of the foreign taxing authority. Double taxation arises wherever a foreign taxing authority, regardless of its international status or lack of status, levies and collects an income, war profits or excess profits tax on income earned by American corporations, or their subsidiaries, within its boundaries. The circumstance that the foreign taxing authority may be great or small, strongly centralized or loosely organized, whether it falls within one of the numerous and varying types of "sovereign" or semi-sovereign entities, or is itself technically a part of such an entity, has no significance. If the foreign tax-levying authority (whatever its precise international status), lays and collects income and profits taxes, by virtue of its own power or of power delegated to it, such a taxing authority falls within the meaning and intent of "foreign country" as that phrase is used in section 238. If income and profits taxes are imposed and collected by a taxing authority foreign to the United States, the obvious purpose of Congress requires that the taxes so levied and collected be credited against the Federal tax, subject to the statutory limitation in the section itself. The subtle distinctions attempted to be drawn in the Government's brief have absolutely no relation to the purpose which Congress sought to effectuate in the legislation involved in this case.

In the Report of the Ways and Means Committee on the Revenue Act of 1918, quoted above at p. 12, no

distinction is made between taxes "paid *to* a foreign country," taxes "levied *in* such countries" and taxes "paid *in* such country." Likewise, in the Conference Report (at p. 53) submitted to the House on February 6, 1919, we find words indicating an understanding that taxes paid or accrued "*in* any possession or foreign country" meant the same thing as taxes paid or accrued "*to* any possession or foreign country." It is there stated:

> "Amendment No. 118: The House bill provided that a citizen of the United States might credit against his income tax the amount of any income, war-profits, and excess-profits taxes paid *to any foreign country,* Porto Rico, or the Philippine Islands, upon income derived from sources therein, and allowed a similar credit to an alien resident if his country made reciprocal provisions. The Senate amendment entirely rewrites the section and broadens it to include a credit for taxes paid to any possession of the United States, which is also to be given to an alien resident of the United States. The House recedes with an amendment providing that if any deduction is allowed for taxes accrued *in any possession or foreign country,* the Commissioner may require the taxpayer to give a surety bond providing for the payment of any tax found to be due the Government in case too great a deduction shall be allowed for accrued taxes *in our possession or any foreign country.*"

It is apparent that Congress, in using the phrase, "paid to any foreign country," did not intend to partially defeat the purpose of the enactment of Section 238. Congress clearly intended the section to apply to all income and profits taxes paid to taxing authorities foreign to the United States.

II.

NEW SOUTH WALES IS A FOREIGN COUNTRY WITHIN THE MEANING OF SECTION 238 OF THE REVENUE ACT OF 1921.

1. *The Word "Country."*

In international law the word "country" may be used in more than one sense. In connection with treaties and negotiations between nations, the term "foreign country" may well be used in the narrow sense of a particular sovereign entity which has power to contract with other foreign nations. Such a "foreign country" may be synonymous with the "High Contracting Parties" spoken of in our treaties. No such restricted meaning, however, can be read into section 238 of the 1921 Act in the light of the legislative purpose of Congress in enacting that provision.

We think that the all inclusive word "country" is an apt word to express the Congressional intent to permit the crediting of taxes paid to New South Wales or to any other taxing authority foreign to the United States. That the word "country" is susceptible of the broader meaning here contended for amply appears from the following statement in Dicey's Conflict of Laws (1927), 4th Edition, pp. 59, 60:

> "The word 'country' has among its numerous significations the two following meanings which require to be carefully distinguished from one another.
>
> (i) A country, in what may be called the *political sense of the word*, means 'the whole of the district or territory, subject to one sovereign power,' such as France, Italy, the United States, or the British Empire.
>
> * * * * *
>
> (ii) A country, in what may be called the *legal sense of the word*, means 'a district or territory, which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the

whole of a territory subject to one system of law'; such as, for example, England, Scotland, or Northern Ireland, or as each of the States which collectively make up the United States.

* * * * *

Thus France, Italy and Belgium, each constitute one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word, and is also one country or law district in the legal sense of the term. On the other hand, the British Empire, while constituting one country, realm, or State in the political sense of the term country, consists of a large number of countries in the legal sense of the word, since England, Scotland, the Irish Free State, Northern Ireland, the Isle of Man, the different Dominions, *provinces, States, colonies,* etc., are in this sense *separate countries* or law districts."

Congress was using the word "country" in its legal sense as defined by Dicey.

Dictionary meanings, though not conclusive, are helpful. Webster's New International Dictionary defines the word "country" as follows:

"Country.—* * *

3. The territory of a nation; *a state, whether independent or not,* that is distinct as to name and the character, language, institutions, or historical memories of its people, as England or Poland." (Italics supplied).

Another pertinent illustration is in the deportation laws. In *Mensevich* v. *Tod,* 264 U. S. 134, it appeared that Mensevich, who was about to be deported to Poland, questioned the deportation as illegal because prior to his emigration to the United States he had been a resident of Tychny in the Province of Grodno, then a part of Russia. The Deportation Act provided for deportation "to the country from whence he came." (U. S. C. Title 8, sec. 156). The deportation warrant or-

dered him to be deported to Poland. At the time the warrant for deportation issued and at the time of the judgment of the District Court, Grodno was occupied and administered by Poland. Obviously, if the term "country" referred to a sovereign political power, Mensevich came from Russia, and should have been deported to Russia. If, on the contrary, the term "country" means the locality of Grodno or Tychny, then the deportation to Poland, of which these localities had become part, was proper. The Supreme Court held that the deportation to Poland was proper and said:

> "The term country is used in § 20 to designate, in general terms, the state which, at the time of deportation, *includes the place from which the alien came.* Whether territory occupied and administered by a country, but not officially recognized as being a part of it, is to be deemed a part for the purposes of this section, we have no occasion to consider. For, since the entry of the judgment below, the Treaty of Riga has so defined the eastern boundary of Poland as to include Grodno; and the United States has officially recognized this boundary line. *Grodno is now confessedly a part of Poland.*" (Italics supplied.)

To the same effect, see *Seif* v. *Nagle*, 14 F. (2d) 416 (C. C. A. 9th Cir.); *United States* v. *Smith*, 2 F. (2d) 90 (D. C. W. D. N. Y.). See also *In re Farez*, 8 Fed. Cas. 1011 (Cir. Ct. S. D. N. Y.).

The word "country" has frequently been applied to the separate States of the United States as distinguished from the federal government. For instance, in *Pagano* v. *Cerri*, 93 Ohio St. 345; 112 N. E. 1037, the Court was construing the familiar type of treaty whereby the two contracting powers agreed that if a citizen of either power should die without will or testament in the territories of the other, a representative might have the right to intervene in the administration and liquidation of the

estate conformably with the law of the country for the benefit of creditors and legal heirs. This particular case involved a treaty with Sweden. The Court said:

> "It is clearly to be seen that in the making of the Swedish Treaty full recognition was given to this fact, and the government at Washington limited the rights and prerogatives granted consuls of Sweden and of all other countries, and bound itself to vouch for only such rights and privileges as the law of each country would permit; *the meaning of the word 'country' being so far as it is applied to the United States,* 'the States of such country.'" (Italics supplied).

See also *In re Ghio's Estate,* 157 Cal. 552; 18 Pac. 516.

In *Mansell's Administrator* v. *Israel,* 6 Ky. 510, 514, the court was interpretaing a statute of limitations which provided that the bar should not run when the defendant was without the *country* and held that this meant without the State. The court said:

> "We cannot suppose as was contended in the argument that the expression 'the country' should be construed to mean the United States and not this State. *This State may certainly with propriety be called a country,* and when the legislature used the expression 'the country,' it is natural to suppose that they meant the country for which they were legislating."

See also *Hendrie Mfg. Co.* v. *Pendrick,* 21 Hawaii 258.

Campbell v. *Barney,* 4 Fed. Cas. 1157 (Cir. Ct. S. D. N. Y.), involved a tariff act which imposed an additional duty on products "of a country beyond the Cape of Good Hope." The goods in question came from Calcutta, part of the British East Indies, and the court held that this was a country beyond the Cape of Good Hope. The Court said:

> "The word 'country' in this section is obviously used in a local and geographical sense without re-

gard to the subdivisions of the territory under different sovereigns or governments."

Thus it is clear that the ordinary meaning of "country" as understood by the courts is in nowise confined to an entity having power to make international treaties. On the contrary, it is frequently used to designate political subdivisions.

The Government contends that international sovereignty is the test. Sovereignty has been given different meanings, depending upon the angle from which one is looking. But take any definition of sovereignty and attempt to ascertain the extent of the sovereignty of all the governments in the world and the act becomes impossible of administration. Or to say the least, there are "no certain and fixed limits" to guide either the Government or the taxpayer such as the Court found necessary in *Stairs* v. *Peaslee, infra,* p. 24.

In support of its theory of international sovereignty, the Government further points out that no credit is allowed for taxes paid to states of the United States. (Petitioner's Brief, p. 15). That may have some significance in determining the meaning of the word "foreign" but not in defining the word "country." The petitioner overlooks the congressional purpose. It makes no difference to the taxing power of the Federal Government whether a corporation is incorporated in Illinois, Delaware or New Jersey. In either event, the income is subject to taxation by the United States. If, however, the incorporation is changed from a State of the United States to the Canadian Province of Ontario, the United States would lose jurisdiction to tax the income.

It is difficult to follow petitioner's process of reasoning on page 14, that the international conference on double taxation held several years after the enactment of

Section 238 of the Revenue Act of 1918 and of the Revenue Act of 1921, has any bearing upon the interpretation of that section. Congress, in 1918 and 1919, adopted Section 238 to relieve American citizens and corporations from burdensome double taxation and in order to encourage the bringing of foreign income into the United States. This enactment was entirely for the benefit of American citizens and corporations and was not based upon any reciprocity or possible treaty arrangement. In the conferences on international double taxation the representatives of the United States were attempting to protect American citizens and corporations from burdensome double taxation by reason of excessive foreign taxes.

Counsel for petitioner seems to argue that because these conferences took place with certain countries rather than all foreign taxing countries, our statute should be construed as limited to a restricted class of countries such as were represented at the conferences, with the result that the burdensome double taxation would be continued to that extent instead of being removed as Congress obviously intended. It would be expected that only so-called "international states" would be represented at an international conference. Such representatives, however, would be the persons to deal with all taxes affecting its nationals, regardless of the internal jurisdiction of taxing authorities.

The "foreign country" which may negotiate with other countries is entirely different from the "foreign country" which imposes and collects income taxes.

The Congressional enactment was framed and designed to meet and only meet the exigency of the situation, which was the allowance of credit of all taxes paid to any taxing authority foreign to the United States.

The narrow meaning contended for by the Government produces the startling result that a credit may be allowed on account of income taxes paid to such sovereign States as Abyssinia, Afghanistan, Albania, Azerbaijan, Straits Settlement, Salvador, San Marino, Monaco and the Free City of Hamburg, but that no credit may be allowed for taxes paid to British Columbia, Ontario, New South Wales, Victoria or the Orange Free State. We do not think Congress had any such distinctions in mind.

2. *The Government's Interpretation of the Term "Foreign Country" Is Based on a Misapplication of Some of the Older Tariff Decisions, but the Fact Is That There Is No Uniform Definition of the Term Even in the Particular Field of Tariff Legislation.*

The Government relies principally on the decision in the case of *Stairs* v. *Peaslee*, 18 How. 521.

The Court's decision in that case is the only one which would have prevented a fraud on the revenues. The tariff law under consideration in that case provided for an appraisal to ascertain the value of the imported goods at the principal markets of the country from which imported. The article imported was cutch, which originated in Calcutta, India. It was shipped to Halifax, Nova Scotia, where there was no market for cutch, and reshipped to the United States. The importers contended that the appraisal should be based on values in Halifax instead of Calcutta or Liverpool, which were the principal markets of Great Britain. It was an obvious attempt to evade the tariff laws. The Court pointed out that if the word "country" were used in any other sense, the law furnished no "certain and fixed limits to guide the appraisers" in determining what were the principal markets. The issue in that case was whether or not

Nova Scotia was a country foreign to Great Britain. In other words, to use Halifax, Nova Scotia, as the place of valuation, it was necessary to segregate Nova Scotia as a country foreign to the rest of Great Britain. The question at bar is whether or not the particular territory with which we are dealing, New South Wales, is foreign to the United States.

In the *Stairs* case, the court was called upon to choose between definitions of the phrase, "foreign country," one of which would effectuate the purpose of Congress and prevent evasion, and the other of which would defeat the purpose of Congress by permitting a palpable evasion.

It will be noted tht the *Stairs* case defines a "foreign country," for the particular purpose of the statute under consideration, as nothing less than all the territory of the British Empire. The Government must inevitably be embarrassed if that old tariff decision were to be held applicable to this entirely different problem presented by our modern income tax acts. It has been the consistent practice of the Bureau to permit the crediting of taxes paid to the Union of South Africa (S. M. 1614, Government's Brief, p. 31), Canada, Australia, and other units of the British Empire (Regulations 62, Articles 382 and 385), such as Newfoundland, India, Straits Settlements. The unfortunate result of attempting to fit the Stairs case into the statutory system of crediting foreign taxes would be to invalidate the Commissioner's own rulings and regulations just referred to and to prohibit the crediting of taxes to units of the British Empire. The result would be to confine the credit solely to taxes paid to Great Britain, an impractical consequence for which we are certain the Commissioner does not desire to contend.

Faber v. United States, 221 U. S. 649, is similar to

the *Stairs* case and seems to require no additional comment.

The case of *United States* v. *The Ship Recorder*, 1 Blatchford 218, cited by petitioner, illustrates more clearly the distinction which we have made. The statute in question provided that goods imported into the United States could only be imported into the United States in American vessels or in ships belonging to citizens of the country from which the goods were imported. The goods in question were imported from British East India in a British vessel. The ship was libeled on the ground that it was not a British East Indian ship. The Court held that British East India was a part of the British Empire and that the word "country" in the particular case referred to the entire British Empire. To have held otherwise, it would have been necessary to hold that British East India was a country foreign to Great Britain, which was obviously not the fact. The Court pointed out that the word "country" may mean city, town, state, geographical locality, a nation, and many other things, dependent upon the context and purpose of the legislation.

The term very properly, we think, even in tariff legislation, receives one interpretation or another according to the context in which it is used, the purpose of the legislation, and the question before the court in each case. For example, *Pearcy* v. *Stranahan*, 205 U. S. 257 (1907), involved the poltical status of the Isle of Pines. The Dingley Act (Act of July 24, 1897, 30 Stat. 151, c. 11) provided for the imposition of duties *"on articles imported from foreign countries"*. (Italics supplied.) The plaintiff brought suit to recover the value of certain cigars seized by the comptfoller at the port of New York, the cigars having been produced and manufactured in the Isle of Pines. The importer's right to recover depended on whether the Isle of Pines was a

"foreign country" within the Dingley Act. The Supreme Court stated that the Isle of Pines was a small island south of Cuba, which "constituted a municipality within the municipality of the Province of Habana and located in the Judicial district of Bejucal" (205 U. S. 257, 269) and had generally been recognized as part of and subject to the government of Cuba. The court concluded:

> "The Isle of Pines continues at least *de facto* under the jurisdiction of the government of the Republic of Cuba, and that settles the question before us, because as the United States have never taken possession of the Isle of Pines as having been ceded by the treaty of peace, and as it has been and is being governed by the Republic of Cuba, *it has remained 'foreign country' within the meaning of the Dingley Act* according to the ruling in *De Lima* v. *Bidwell*, 182 U. S. 1, and cases cited; *United States* v. *Rice*, 4 Wheat. 246." (Italics supplied.)

It appears, therefore, that there is no uniformity even in the decisions under the Tariff Acts. The term "foreign country" may mean anything from any foreign political subdivision to what is generally spoken of as the British Empire. The construction of the term depends upon the context of the legislation and the purpose sought to be accomplished. The purpose sought to be accomplished by the system of crediting foreign taxes prescribed in section 238 of the 1921 Act plainly was to ameliorate the double taxation of foreign income. There is nothing to prevent this Court from giving full force and effect to that purpose.

3. *Status of New South Wales.*

In Vol. 10, The Laws of England (1909), by the Earl of Halsbury, p. 508, it is stated:

> "Responsible government was conferred upon New South Wales by the Imperial Constitution Act of 1855, which empowered the Sovereign to assent

to the Constitution Act of the colony passed in 1853. Further colonial legislation has since taken place. There is now a Legislative Council of sixty-one members appointed by the Crown for life, unpaid except the President and the Chairman of Committees and the Ministers. The Legislative Assembly consists of ninety members, elected by ballot on one and the same day for three years, unless the assembly is previously dissolved."

In 1900, the Commonwealth of Australia was created and New South Wales was a party to this pact. The Commonwealth of Australia was created by the Constitution Act of 1900 (quoted in part, pp. 35-42, Petitioner's Brief). However, in adopting the Constitution Act of 1900, Parliament did not repeal the Act of 1855 giving New South Wales its status as a self-governing colony or sovereign state. See *Attorney General for Commonwealth of Australia* v. *The Colonial Sugar Refining Co.* (1914) A. C. 237. This decision by the English courts thoroughly explains the nature of the Commonwealth of Australia and shows that New South Wales remained as it was before the federation, a self-governing colony with its sovereign powers under the constitution of 1855, limited only by the powers which were granted to the Commonwealth of Australia. New South Wales is today and was in 1923 a "country" in the legal sense of the word as defined in Dicey's Conflict of Laws, pages 59, 60, *supra*, p. 18.

Even if the Regulation relied upon by the Government is exclusive and only a "foreign sovereign state or self-governing colony" is a "foreign country" within the meaning of such Regulation, New South Wales is not excluded. New South Wales became a self-governing colony in 1855. See 18 and 19 Vict. C. 54; Vol. II, The Laws of England (1909), by the Earl of Halsbury, Vol. 10, p. 519, Note (l). It is pointed out above that this status was not changed by the Constitution Act of 1900,

under which the Commonwealth of Australia was created.

In Bryce, Modern Democracies (1927), Vol. II, p. 177, it is stated:

> "In its practical working from year to year, the Commonwealth is, and each State also continues to be as a State what it was as a colony, a Crowned Republic, *i. e.*, a community monarchical in its form, but republican in its spirit and operation, and indeed more democratic than many republics are. Each community is attached, not only legally, but by what are now the stronger ties of sentiment and reciprocal interest, both to the mother country and to the other British self-governing Dominions."

In Allen, The Evolution of Governments & Laws (revised edition, 1922), at p. 126, under a chapter entitled, "The British Empire," Mr. Allen divides the territories ruled by Great Britain into a number of classes which the first is described as: "Those having representative government with ministers responsible to popular bodies, including Canada, Newfoundland, Queensland, *New South Wales*, Victoria, South Australia, West Australia, Tasmania, New Zealand and Cape Colony."

In Volume I of the Round Table Studies, entitled, "An Analysis of the System of Government Throughout the British Empire," the Commonwealth of Australia is described as "a federation of self-governing colonies." New South Wales is described as a "self-governing colony, a constituent part of the Commonwealth of Australia." It will be noted that this analysis used the exact term contained in Article 382, Regulation 62, "a self-governing colony."

This much will show that when the taxpayer filed its return it had no reason to suspect that the Government would disallow the credit taken for taxes paid to New South Wales. New South Wales was a "foreign sovereign State". It was one of the federation of self-gov-

erning colonies forming the Commonwealth of Australia. The credit was said by the Regulations of the Treasury Department to be allowable.

4. *The Tax in Question Was Levied Pursuant to Power Delegated to New South Wales by the United Kingdom of Great Britain and Ireland.*

The taxes in question were not imposed by New South Wales by reason of a delegation of power to it by the Commonwealth of Australia. They were levied pursuant to a delegation of power from the United Kingdom of Great Britain and Ireland. By the Constitution of 1855, Great Britain gave New South Wales the sovereign power to impose taxes. That Act has not been repealed. See *Attorney General for Commonwealth of Australia* v. *The Colonial Sugar Refining Co.* (1914) A. C. 237.

New South Wales, except to the extent that it delegated certain specific powers to the Commonwealth of Australia, stands in the same position before the Crown as the Commonwealth itself.

The Governor-General of the Commonwealth has no power to veto any act of New South Wales. In this connection, it should be noted that laws passed by Canada, the Commonwealth of Australia, and New South Wales may be disallowed or vetoed by the Crown. Such disallowances (see p. 542, Vol. 10, The Laws of England (1909), by the Earl of Halsbury) may take place,—

> "In the case of laws passed by the Dominion of Canada, within two years of the receipt by the Secretary of State from the Governor-General of a copy of the Act;
>
> * * * * *
>
> In the case of laws passed by the Commonwealth of Australia, within one year from the Governor-General's assent;
>
> In the case of laws passed by New South Wales within two years from the receipt by the
>
> * * *

Secretary of State from the Governor of a copy of the law;"

Since New South Wales is a self-governing colony, its affairs are supervised on behalf of the Crown by the same office which supervises the affairs of other self-governing colonies. If it were only a crown colony as distinguished from a self-governing colony, its affairs would be supervised by the Crown Colonies Department. See 18 C. J. 494. On the other hand, if it were a subdivision of the Commonwealth of Australia, it would have no direct dealings with the Crown. The Governor of New South Wales is appointed by the Crown and not by the Governor-General of the Commonwealth. A Legislative Council of sixty-one members is appointed by the Crown for life and not by the Governor-General of the Commonwealth, the other part of the legislative body being elected by the people. See 18 C. J. 496.

By reason of the fact that New South Wales continues in the same relationship to the Crown as it did prior to the formation of the Commonwealth, to deny the credit for taxes paid to New South Wales is to deny a credit for taxes paid to the Commonwealth, for New South Wales is just as much a self-governing colony as the Commonwealth. The taxes paid to New South Wales must be allowed as a credit either because they are imposed by New South Wales as a sovereignty or because under the rule applied in *Myers* v. *United States,* 140 Fed. 648, they are taxes of the United Kingdom of Great Britain and Ireland.

In *Myers* v. *United States,* the Court was considering a similar contention with respect to a question arising under the tariff laws and said:

"The Dominion of Canada is divided into provinces, among which are Ontario and Quebec. By the British North America Act (Chapter 3, 30-31

> Vict.), the Dominion of Canada has exclusive power to impose export or import duties: But in sections 91 and 92 of that Act we find, in the distribution of powers among the provinces, that it is provided each provincial legislature has the following power of legislation:
>
> (1) Power of direct taxation within the province, in order to the raising of revenue for provincial purposes; * * * I think the province has the power of taxation by way of license in those matters confided to it. If in the exercise of this power lawfully granted, whether by the mother country direct or by it through the Dominion, the province in point of fact and in effect imposes an export duty on pulp wood exported to the United States, it is an imposition of that duty by the Dominion of Canada. * * * It is not done directly by the Kingdom of Great Britain, or directly by the Dominion of Canada, but it is done by legislation authorized by the Dominion."

It is clear that prior to the creation of the Commonwealth, New South Wales was an international person. Its position was changed to some extent by the formation of the federation, but New South Wales still remains an international person. As previously pointed out, it still retains such of its external sovereignty as has not been delegated to the Commonwealth.

It retains such of its treaty-making power as was not transferred to the Commonwealth, making it impossible in certain instances for the Commonwealth to make a treaty without the consent of New South Wales. See Keith, Responsible Government in the Dominions (2nd Edition, 1928), Vol. II, p. 620.

Furthermore, since it is a member-state of a federation or federal union, it is for some part an international person, for in international law any recognition granted the Commonwealth by any foreign state must include a readiness to recognize, on the one hand, the body of the member-states, the Federal State, as one composite in-

ternational person regarding certain matters, and, on the other hand, the single member-states as international persons with regard to other matters. The recognition of the single member-states as international persons goes side by side with the recognition of the Federal State. See 1 Oppenheim International Law (3rd Ed., 1920, p. 160).

For these reasons, we contend that the Board of Tax Appeals was correct in holding that the tax was either an income tax of the British Empire or was levied by New South Wales as a sovereign state, which entitles it to be classified as a foreign country in its own right.

5. *The Regulations of the Treasury Department have adopted a construction of the word "country" and of the term "foreign sovereign state or self-governing colony" which would include New South Wales.*

Article 382, Regulations 62 (Petitioner's Brief, p. 25), states that the term "foreign country" includes within its meaning any "foreign sovereign state or self-governing colony." It is clear that the Treasury Department in drafting Article 382, Regulations 62, did not consider international statehood to be the test. This article of the Regulations expressly states that Hamburg is a "foreign country." Hamburg does not possess international statehood. Its position in the German Republic is much the same as the position of New South Wales. Each is a sovereign state, but neither sit in the family of nations. If Hamburg is a "foreign country," so is New South Wales. The express recognition by the Treasury Department that Hamburg is a "foreign country" precludes any contention on the part of the Government that the international rank of a country has ever been the test in the Regulations of the Treasury Department.

The ruling (S. M. 1614, printed at pp. 31-32 of Petitioner's Brief) which denied the credit to the taxpayer, issued after the taxpayer filed its return, does not make international sovereignty the test. It was made upon the erroneous assumption that New South Wales is a "subdivision" of the Commonwealth of Australia and that it is not a "foreign sovereign State or self-governing colony." The theory that international sovereignty is the test is *new* in this case.

One other ruling relied upon by the Government (Solicitor's Memorandum 1187, printed at pp. 28-30 of Petitioner's Brief) was never published for the information of taxpayers. Even if it had been, it would have favored the taxpayer in this case. This ruling was given upon the basis that Switzerland had ceased to be a system of confederated states and had become one composite State. For this reason, the Government held that the Cantons of Switzerland did not constitute sovereign states. O. D. 1050, referred to by the Government (printed at p. 30, Petitioner's Brief) was likewise issued upon the ground that the Province of British Columbia was not a sovereign State. The differences between the provinces of Canada and New South Wales are clearly pointed out in the case of the *Attorney General for the Commonwealth of Australia* v. *The Colonial Sugar Refining Co., supra,* p. 28, where the court pointed out that the Dominion of Canada is not a federation of colonies. Both rulings indicated that the Treasury Department was attempting to construe the Regulation as excluding all taxes except those paid to a "foreign sovereign state or self-governing colony." However, the phrase "foreign sovereign state or self-governing colony" is one as susceptible of different meanings as the phrase, "foreign country," and the rulings gave no indication that the word "sovereignty" meant interna-

tional sovereignty. There can be no question but that New South Wales is a "sovereign state or self-governing colony" under practically any definition of sovereignty except that applicable only in determining international statehood.

The credit allowed by Section 222 of the Revenue Act of 1921 to individuals for foreign taxes is similar to that allowed corporations by Section 238. One difference, however, is that the credit allowed resident aliens is dependent upon whether the foreign country allows a similar credit to citizens of the United States residing in the foreign country.

Obviously the term "foreign country" in Section 222, which allows the credit to individuals, must have the same meaning as in Section 238, which allows the credit to corporations. The Regulations show that the Treasury Department in construing Section 222 has followed the rule contended for by the respondent rather than the rule making international sovereignty the test. In Article 385 of Regulations 62 (printed in Appendix at p. 45), the Treasury Department has compiled an incomplete list of the "countries" which in its opinion do or do not satisfy the similar credit requirement in Section 222 (a) (3). Except for some changes which are immaterial to our problem, the list is substantially the same in Article 385 of Regulations 45 under the Act of 1918, in Article 385 of Regulations 65 under the Act of 1924, in Article 385 of Regulations 69 under the Act of 1926, and in Article 694 of Regulations 74 under the Act of 1928. Hence it is clear that in administering the provisions of Section 222 (a) (3) the same rule has been followed under the Acts of 1918, 1921, 1924, 1926 and 1928.

In Article 385 of Regulations 62, the Department has listed as "countries" such jurisdictions as Bahama,

Bermuda, Dutch Guinea, India, and Straits Settlements. This conclusively rebuts any presumption that the Government has consistently followed the rule that international statehood is the test in determining what is a "country." These colonies have neither international nor quasi-international sovereignty.

This list of "countries" also shows that the Treasury Department has not followed the rule that a colony must be a self-governing colony in order to be a "country" within the meaning of the credit provisions. India, for example, is now fighting for self-government. "From a strict constitutional point of view, India may be said to rank as a Crown colony." See 18 C. J. 536. Bahama, Bermuda, and Straits Settlements are also Crown colonies as distinguished from self-governing colonies, such as New South Wales and Newfoundland.

If the Government, in determining what constitutes a "country" for purposes of the credit allowed corporations, followed the same rule which it applied in determining what is a "country" for purposes of the credit allowed individuals, it would be compelled to allow the taxpayer a credit for the taxes paid New South Wales. New South Wales comes nearer to having international sovereignty than Bahama, Bermuda or India. Further, if whether the colony is self-governing is the test, then there is all the more reason for classifying New South Wales as a "country," for it has been a self-governing colony for over seventy years while other colonies which the Government has treated as "countries" have not to this date been granted responsible government.

As further evidence of what the Treasury Department has considered to be "countries," we refer to Article 307 of Regulations 45 (printed in Appendix at p. 46). This is a list of some of the "countries" which did or

did not satisfy the similar credit requirement of Section 216(e), Act of 1918. This section of the Act of 1918 allowed a personal exemption to non-resident aliens only if the "country" of which the non-resident alien was a citizen or subject allowed a similar exemption to citizens of the United States residing in such "country." When we look at the "countries" listed in this Article of the Regulations, a number of questions arise. How can the British fortress of Gibralter be treated as a "country" without so treating New South Wales? Are our citizens and corporations to be allowed a credit for taxes paid to the provinces of Austria but none for taxes paid to New South Wales? Are income taxes levied by Gold Coast, Gorlitz, or Mauritius burdens upon our foreign trade while the income taxes of New South Wales are not? Is Weihaiwei, a naval and coaling station leased by Great Britain from China, to be treated as a "country" while New South Wales is not?

The phrase "foreign country" is also used in Section 213 (b)(8) of the Revenue Act of 1921. This section grants a limited exemption to non-resident aliens and foreign corporations of income derived from the operation of ships documented "under the laws of a foreign country." A similar provision is contained in the later Acts, and we have printed in the Appendix (p. 47) a part of Article 89 of Regulations 69 to show the manner in which the Treasury Department has applied the phrase, "foreign country," as used in this section of the Act. In this Article of the Regulations, the Treasury Department has listed as "foreign countries" such countries as Antigua, St. Lucia, St. Vincent, British Honduras, Trinidad, without any qualification that they must be charged with international responsibility prior to being treated as foreign countries.

Again the phrase, "foreign country," is used in Sec-

tion 215(b) of the Revenue Act of 1921 relating to deductions from the net income of an estate or trust. This section provides that:

> "Amounts paid under the laws of any * * * *foreign country* as income to the holder of a life or terminable interest * * * shall not be reduced * * * by any deduction * * * not allowed under the laws of such * * * *foreign country.*"

The Government, in its ruling (Petitioner's Brief, pp. 31-32) has treated the Commonwealth of Australia as a "foreign country." The Commonwealth of Australia has only such powers as are granted it and the colonies have not delegated the power to regulate trusts and estates. On points like those referred to in Section 215(b) we must look to the laws of the colonies. If the term, "foreign country," does not include New South Wales, then the limitation in Section 215(b) does not apply and a taxpayer is allowed a greater deduction in computing his income tax than is actually allowed him in determining the net income of the estate or trust for purposes of administering the estate or trust. However, if as the taxpayer contends, New South Wales is a "foreign country," the taxpayer will be taxed upon his true net income.

Section 256 of the Revenue Act of 1921 provides for information returns, regardless of amounts,

> "in the case of collections of items (not payable in the United States) of interest upon the bonds of *foreign countries* * * *."

We understand that the Treasury Department holds this provision to include bonds issued by all foreign governments, whether or not the government was that of a foreign state or nation entitled to a place in the family of nations. Accordingly, information returns should be made of such interest on bonds issued by New South Wales or City of Berlin, for example, as well as

on bonds issued by the British Government or the Commonwealth of Australia.

It thus appears that the phrase, "foreign country," is used in a number of sections of the Revenue Act of 1921, as well as in other acts. If this phrase be interpreted as meaning any country foreign to the United States, it will fit each of those sections and clearly be in accordance with the congressional intent. The Bureau has adopted and applied this interpretation of the phrase, "foreign country," when used in every other section except those sections giving credit to corporations for foreign income taxes. In fact, the interpretations under the credit sections by the Bureau have not been so limited as is contended for by the Government in this case. There is no logical reason for a different interpretation of the phrase in the different sections.

III.

THERE WAS NO CONSISTENT CONSTRUCTION OF THE TERM "FOREIGN COUNTRY" BY THE BUREAU OF INTERNAL REVENUE.

Prior to the passage of the Revenue Act of 1921, the credit for foreign taxes, such as that involved in this case, was allowed only by the Revenue Act of 1918. See sections 238(a) and 240(c), Revenue Act of 1918. However, beginning with the Corporation Excise Tax of 1909, corporations have been allowed to deduct foreign taxes from their gross income. The particular language of each of these Acts allowing a deduction from gross income is as follows:

Taxes "imposed by the government of *any foreign country* as a condition to carry on business therein."—Section 38 (Second), Corporation Excise Tax of 1909.

Taxes "imposed by the government of *any foreign country.*"—Section G(b), Act of 1913.

Taxes "imposed by the authority of * * * *any foreign country.*" Section 12(a), Act of 1916; Section 1207(1), Act of 1917.

Taxes "paid or accrued within the taxable year imposed * * * by the authority of *any foreign country,* except the amount of income, war profits and excess profits taxes allowed as a credit under section 238." Section 234(a)(3), Act of 1918.

The consistent interpretation of the Bureau of Internal Revenue was to allow the deduction of all taxes imposed by any taxing authority foreign to the United States. All of the regulations dealing with the subject, Regulations 33, interpreting the Revenue Acts of 1913 and 1916, Regulations 33 Revised, interpreting the Revenue Act of 1917, and Regulations 45 under the Revenue Act of 1918, defined "foreign country" specifically as including states, parts or divisions thereof. In Article 8 of Regulations 33 and the same article of Regulations 33 Revised, the interpretation was:

> "Taxes: State or any political subdivision thereof, Federal or foreign * * *."

In Article 382 of Regulations 45 (First Edition. See Par. 3010, pages 384-5, Corporation Trust Company Income Tax Service, 1919 Edition), it is stated:

> "'Foreign country' means any governmental authority, not that of the United States *or any part or possession thereof, having power to impose such taxes,* and it therefore includes a self-governing colony, such as the Dominion of Canada." (Italics supplied.)

Hence it appears that when the Revenue Act of 1918 was adopted and the credit was first allowed for taxes paid to "any foreign country," the Department was interpreting the phrase to include all foreign income taxes.

The purpose for which the credit provision was adopted in the Act of 1918 indicates that Congress intended that the phrase, "foreign country," be used in the same sense that it was used in the Act of 1917 and prior Acts.

In the Report of the Ways and Means Committee reporting the 1918 Revenue Act (*supra,* p. 12), it appears very clearly that it was the intention that the *credit* of income and/or profits taxes paid to foreign countries should be co-extensive with the *deduction* of such taxes theretofore allowed. In other words, the only change was that all income and/or profits taxes imposed by taxing authorities foreign to the United States should be allowed as a credit instead of a deduction. The Senate Finance Committee adopted this report (pp. 19 and 31, Senate Finance Committee Report).

When the Secretary of Treasury published his report in 1919, he included therein the report of the Commissioner of Internal Revenue dated October 15, 1919. At p. 1102 of the Secretary's report, the Commissioner said:

> "New provisions of the Revenue Act of 1918 include * * * credits against the tax for income and excess profits taxes *paid to other taxing authorities.* * * *"

When Regulations 45 were later revised (see Regulations 45, 1920 Edition), the exact definition of the words "foreign country" as contained in the Regulation above quoted, was stricken out and in its place there was inserted the following:

> "'Foreign country' includes within its meaning any foreign state or self-governing colony (for example, the Dominion of Canada) but does not include a foreign municipality (for example, Montreal) unless itself a sovereign State (for example, Hamburg)."

Solicitor's Memorandum 1614 was issued March 24,

1924, and construed Section 238 to include only a very limited class and to exclude New South Wales. The ruling in 1924 denying the credit for taxes paid to New South Wales in addition to being the first warning of the new attitude of the Bureau, has been contested and has never been accepted by taxpayers.

The regulations and rulings construing the term "foreign country," in other sections of the Revenue Acts, including the allowance of credits to individuals, would include any taxing authority foreign to the United States.

Therefore, "the long and consistent administrative construction" claimed by petitioner, did not and does not exist. The construction placed upon a statute by the department charged with its execution is never to be treated as having been adopted by Congress when such construction is not settled and has not received long-continued application by the executive department. In *Iselin* v. *United States,* 270 U. S. 245, 251, Mr. Justice Brandeis said:

> "But the construction was neither uniform, general, nor *long continued;* neither is the statute ambiguous. Such departmental construction cannot be given the force * * * of law."

In *The Dollar Savings Bank* v. *United States,* 86 U. S. 227, 237, this court in denying that the executive construction had been adopted by Congress, said:

> "This, however, can only be when the statute is capable of the construction given to it, and *when that construction has become a settled rule of conduct.*"

See, also, *Missouri Pac. R. Co.* v. *Hellmich,* 12 Fed. (2d) 978; *United States* v. *Rodenbaugh,* 21 Fed. (2d) 781, 785.

At the time of the adoption of the Revenue Act of 1918 and of the Revenue Act of 1921, the Bureau of In-

ternal Revenue was construing the words, "taxes paid to a foreign country," as meaning taxes paid to any taxing authority foreign to the United States. Congress, itself, used the phrases, "Taxes paid to a foreign country," "Taxes imposed by the authority of a foreign country," and "Taxes paid in a foreign country," and "Foreign Taxes," practically interchangeable. (Report Ways and Means Committee, 1918 Act, *supra*, p. 12; adopted by Senate Finance Committee; Report Conference Committee, 1918 Act, p. 60). The opinion of the Solicitor of Internal Revenue given in 1924 limits the words, "foreign country," as used in Section 238, to certain sovereign entities, difficult, if not impossible, to define. The Bureau has continued to construe similar language under Section 222 and other sections to mean all taxes paid to any taxing authority foreign to the United States.

Under such circumstances, it cannot be said that Congress has adopted any construction by the Bureau. If so, which one?

Conclusion.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals must be sustained.

Respectfully submited,

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APPENDIX.

ARTICLE 385, REGULATIONS 62, PROMULGATED UNDER ACT OF 1921.

ART. 385. COUNTRIES WHICH DO OR DO NOT SATISFY THE SIMILAR CREDIT REQUIREMENTS.—(a) The following is an incomplete list of the countries which satisfy the similar credit requirement of section 222(a)(3) of the Revenue Act of 1921, either by allowing to citizens of the United States residing in such countries a credit for the amount of income, war profits, or excess profits taxes paid to the United States, or in imposing such taxes, by exempting from taxation the incomes reimposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such countries: Bulgaria, Canada, Italy, Newfoundland, Salvador. (b) The following is an incomplete list of the countries which do not satisfy the similar credit requirement of section 222(a)(3) of the Revenue Act of 1921, either by allowing no credit to citizens of the United States residing in such countries, for the amount of income, war profits, or excess profits taxes paid to the United States, or because such countries do not impose any income, war profits, or excess profits taxes: Argentina, Bahama, Belgium, Bermuda, Bolivia, Bosnia, Brazil, Chile, China, Costa Rica, Dutch Guiana, Ecuador, Egypt, Finland, France, Great Britain and Ireland, Guatemala, Herzegovina, India, Jamaica, Japan, Montenegro, Morocco, New Zealand, Nicaragua, Panama, Paraguay, Persia, Peru, Portugal, Rumania, Santo Domingo, Serbia, Siam, Straits Settlements, Sweden, Switzerland, Venezuela. The former names of certain of these territories are here used for convenience in spite of the actual or possible change in the name or sovereignty. A resident of the United States who is a citizen or subject of any country in the first list is entitled, for the purpose of the total tax due the United States for 1921 (as to fiscal years beginning in 1920, see art. 386) and subsequent years, to a credit for the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country. If he is a citizen or subject of any country in the second list, he

is not entitled to such credit. If he is a citizen or subject of a country which is in neither list, then to secure the desired credit he must prove to the satisfaction of the Commissioner that his country satisfies the similar credit requirement of the statute.

ARTICLE 307, REGULATIONS 45, PROMULGATED UNDER ACT OF 1918.

ART. 307. WHEN NONRESIDENT ALIEN INDIVIDUAL ENTITLED TO PERSONAL EXEMPTION.—(a) The following is an incomplete list of countries which either impose no income tax or in imposing an income tax allow both a personal exemption and a credit for dependents which satisfy the similar credit requirement of the statute: Argentina, Bahama, Barbados, Basutoland, Bechuanaland Protectorate, Belgium, Bermuda, Bolivia, Bosnia, Brazil, British Guiana, British Honduras, Bukownia, Bulgaria, Canada, Carniola, Ceylon, Chile, China, Columbia, Cuba, Cyprus, Czechoslovakia, including Bohemia, Moravia, and Slovakia, Dalmatia, Denmark, Ecuador, Egypt, Falkland Islands, Fiji Islands, France, Galicia, Gambia, Germany, Gibraltar, Gold Coast, Goritz, Gradisca, Greece, Grenada, Guatemala, Herzegovina, Hongkong, Istria, Jamaica, Kenya, Luxemburg, Malay States, Malta, Mauritius, Mexico, Montenegro, Montserrat, Morocco, Newfoundland, Nicaragua, Nigeria, Northern Rhodesia, Norway, Nyasaland Protectorate, Panama, Paraguay, Persia, Peru, Porto Rico, Portugal, Roumania, St. Kitt-Nevis, St. Helena, Santo Domingo, Serbia, Siam, Sierra Leone, Silesia, Somaliland Protectorate, Spain, Swaziland, Switzerland, Trieste, Uganda Protectorate, Union of South Africa, Venezuela, Virgin Islands (British), Weihaiwei, Western Pacific Islands, Zanzibar Protectorate. (b) The following is an incomplete list of countries which in imposing an income tax allow a personal exemption which satisfies the similar credit requirement of the statute, but do not allow a credit for dependents: Bachka, Banat of Temesvar, Croatia, Finland, India, Italy, Salvador, Slavonia, Transylvania. (c) The following is an incomplete list of countries which in imposing an income tax do not allow to citizens of the United States not residing in such country either a personal exemption or a credit for dependents and therefore fail entirely to satisfy the similar credit requirements of the statute: Australia, Austria,

including Carinthia, Lower Austria, Salzberg, Styria, Tylor, Upper Austria and Vienna, Costa Rica, Dutch Guiana, Great Britain and Ireland, Japan, the Netherlands, New Zealand, Trinidad, Sweden. The former names of certain of these territories are here used for convenience, in spite of an actual or possible change in name or sovereignty. A nonresident alien individual who is a citizen or subject of any country in the first list is entitled for the purpose of the normal tax to such credit for personal exemption and for dependents as his family status may warrant. If he is a citizen or subject of any country in the second list he is entitled to a credit for personal exemption, but to none for dependents. If he is a citizen or subject of any country in the third list he is not entitled to credit for either personal exemption or for dependents. If he is a citizen or subject of a country which is in none of the lists, then to secure credit for either a personal exemption or for dependents he must prove to the satisfaction of the Commissioner that his country does not impose an income tax or that in imposing an income tax it grants the similar credit required by the statute.

ARTICLE 89, REGULATIONS 69, PROMULGATED UNDER ACT OF 1926.

ART. 89. ADDITIONAL EXCLUSIONS FROM GROSS INCOME.—The following additional exclusions from gross income are allowed by the Revenue Act of 1926:

* * * * *

(a) The following is an incomplete list of the foreign countries which either impose no income tax, or, in imposing such tax, exempt from taxation so much of the income of a citizen of the United States nonresident in such foreign country and of a corporation organized in the United States as consists of earnings derived from the operation of a ship or ships documented under the laws of the United States: Argentine Republic, Bulgaria, Denmark, Egypt, Germany, Great Britain and Northern Ireland, Iceland, Italy, Japan (from July 18, 1924, only, the date on which the Japanese law granting exemption to American citizens and American corporations was promulgated), Norway, Paraguay, Persia, St. Lucia, Siam, Straits Settlements, Sweden, and Venezuela. The exemption accorded to Great Britain and Northern Ire-

land does not extend to the Irish Free State but is limited to residents of Great Britain and Northern Ireland, other than citizens of the United States, and to corporations organized under and existing by virtue of the laws of the United Kingdom. (b) The following is an incomplete list of the foreign countries which, in imposing an income tax upon the income of citizens of the United States nonresident in such countries or of corporations organized in the United States, do not exempt from taxation the earnings derived from the operation of a ship or ships documented under the laws of the United States: Antigua, Belgium, British Honduras, Costa Rica, Dominica, Fiji, Finland, France, Greece, Grenada, India, Jamaica, The Netherlands New Zealand, Peru, St. Vincent, Spain, Trinidad, and Union of South Africa.

So much of the income from sources within the United States of a nonresident alien individual or of a foreign corporation as consists of earnings derived from that operation of a ship or ships documented under the laws of any of the countries in the first list is not required to be included in the gross income of such nonresident alien individual or foreign corporation for the purpose of Federal income tax. The income from sources within the United States of a nonresident alien individual or of a foreign corporation which consists of earnings derived from the operation of a ship or ships documented under the laws of any of the countries in the second list is required to be included in the gross income of such nonresident alien individual or foreign corporation and is subject to Federal income tax. If a nonresident alien individual or a foreign corporation receives income from sources within the United States consisting of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which is in neither list, the amount so received must be included in gross income unless satisfactory proof is furnished either (a) that such foreign country imposes no income tax, or (b) if an income tax is imposed that the foreign statute grants an equivalent exemption to citizens of the United States nonresident in such country and to corporations organized in the United States;

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SUPREME COURT OF THE UNITED STATES.

No. 378.—October Term, 1931.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* Chicago Portrait Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 23, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This proceeding was brought for the redetermination of a deficiency in income tax for the year 1923. The respondent, Chicago Portrait Company, is an Illinois corporation with its principal place of business at Chicago. It owned 51 per cent. of the capital stock of the International Art Company of Sydney, Australia, a foreign corporation. Respondent received dividends from the International Art Company and sought credit for a proportionate part of the income taxes paid by that corporation to the Commonwealth of Australia, to the State of New South Wales, and to the Dominion of New Zealand. Section 238 (e) of the Revenue Act of 1921 (42 Stat. 227, 258, 259) permitted credit in the case of such taxes paid "to any foreign country." Credit was allowed on account of the income taxes paid to the Commonwealth of Australia and to the Dominion of New Zealand but was refused as to those paid to the State of New South Wales. The Board of Tax Appeals held that the respondent was entitled to the credit with respect to the last mentioned taxes also, and the Circuit Court of Appeals affirmed that decision. 16 B. T. A. 1129; 50 Fed. (2d) 683. This Court granted a writ of certiorari.

The sole question is whether New South Wales is a "foreign country" within the meaning of the applicable statute.[1]

[1]The provisions of Section 238 (a) and (e) of the Revenue Act of 1921 are as follows:

"Sec. 238 (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be

The word "country", in the expression "foreign country", is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations[2]; or it may mean a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger international unit.[3] The term "foreign country"

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credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided*, That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. . . .

"(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided*, That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term 'accumulated profits' when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; . . . ."

[2]Oppenheim, International Law, 4th ed., vol. I, secs. 63, 64, pp. 133-135; Hyde, International Law, vol. 1, secs. 6-8, pp. 15-18; Moore's International Law Digest, vol. I, pp. 14-18.

[3]See Dicey, Conflict of Laws, 4th ed., pp. 59, 60.

is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation.[4]

In the case of tariff acts, this Court said in *Stairs* v. *Peaslee*, 18 How. 521, 526, that the word 'country' has always been construed "to embrace all the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control." See, also, *United States* v. *The Ship Recorder*, 1 Blatchf. 218, 225-227; *Campbell* v. *Barney*, 5 Blatchf. 221. Accordingly, in construing the Act of March 3, 1851 (9 Stat. 629, 630) providing that imported merchandise should be appraised at its market value "at the principal markets of the country" from which it had been imported, the Court held that a commodity shipped from Halifax, Nova Scotia, should be appraised according to the value in the principal markets under the British rule, and these were found, in fact, to be London and Liverpool. After the ratification of the Treaty of Peace between the United States and Spain, Porto Rico and the Philippines ceased to be "foreign country" under the tariff laws. *De Lima* v. *Bidwell*, 182 U. S. 1; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 179. It followed that the term "other countries" in the Commercial Convention with Cuba of 1903 (33 Stat. 2136, 2140) did not include the Philippine Islands. *Faber* v. *United States*, 221 U. S. 649, 658. Under the provisions of the Platt Amendment and the Constitution of Cuba, the Isle of Pines was *de facto* under the jurisdiction of Cuba and hence remained "foreign country" within the meaning of the Tariff Act of 1897 (30 Stat. 151). *Pearcy* v. *Stranahan*, 205 U. S. 257, 265.

In construing legislation providing for the deportation of aliens "to the country whence they came", the place of emigration affords the dominant consideration. Thus, under the Immigration Act of 1917 (39 Stat. 874, 890) the Court held that an alien emigrating from Grodno, then a part of Russia, was properly deported to Poland, because at that time Grodno was a part of Poland. "The

[4] Wayman v. Southard, 10 Wheat. 1, 29; Marriott v. Brune, 9 How. 619, 635, 636; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 293; United States v. Louisville & Nashville R. R. Co., 236 U. S. 318, 333; Inter-Island Steam Navigation Co. v. Ward, 242 U. S. 1, 4; Porto Rico Railway, Light & Power Co. v. Mor, 253 U. S. 345, 348.

term country," said the Court, was used in the statute "to designate, in general terms, the state which, at the time of deportation, includes the place from which the alien came." *Mensevich* v. *Tod*, 264 U. S. 134, 136, 137. The evident purpose of the statute determined the significance to be attached to the expression.

In the instant case, the question is one of credit for income taxes "paid to any foreign country." The word "country" is manifestly used in the sense of government. And to decide what government fits the description, whether only that of a foreign power which may be considered an international person, or that of a political entity which, although not an international person, levies and collects income taxes which may be the subject of the intended credit, it is necessary to consider the object of the enactment and to construe the expression "foreign country" so as to achieve, and not defeat, its aim. We think that the purpose of the statute is clear. The fact that the provision is for a credit to the domestic corporation, against income taxes payable here, of income taxes "paid during the same taxable year to any foreign country," itself demonstrates that the primary design of the provision was to mitigate the evil of double taxation. Cognate provisions in the case of individuals disclose a similar intent. Section 222 (a)[5] of the same Revenue Act (1921) provides that the income tax, in the case of a citizen of the United States, should be credited with the amount of any income taxes "paid during the taxable year to any foreign country or to any possession of the United States." In the case of an alien resident of the United States, the credit is conditioned upon reciprocal treatment. The resident alien is to be credited with "the amount of any such taxes

[5] "Sec. 222. (a) That the tax computed under Part II of this title shall be credited with:

"(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States; and

"(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

"(3) In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; . . ."

paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country." 42 Stat. 249.[6]

In the case of domestic corporations, the purpose is also disclosed to facilitate their foreign enterprises. The provision of Section 238 (e) of the Revenue Act of 1921 indicates appreciation of the practical exigencies which lead to the foreign incorporation of subsidiaries for the extension by domestic corporations of their business abroad. This clearly appears to be the reason for the allowance by that Act of a credit to a domestic corporation, against

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[6]With respect to the allowance of such credits, as distinguished from deductions from gross income in computing net income, the Committee on Ways and Means of the House of Representatives in its report on the Revenue Bill of 1918 (H. R. Rep. No. 767, 65th Cong., 2d sess., p. 11), said: "Under existing law a citizen of the United States can only deduct income war or excess profits taxes paid to a foreign country from gross income in computing net income. With the corresponding high rates imposed by certain foreign countries the taxes levied in such countries in addition to the taxes levied in the United States upon citizens of the United States place a very severe burden upon such citizens. The bill provides that a credit against the income tax imposed in the United States be allowed a citizen of the United States subject to income and war or excess profits taxes in a foreign country of an amount equal to the tax paid in such country upon income that is received from sources within such country. The bill further provides that, in the case of an alien resident of the United States who is a citizen or subject of a country which imposes income, war profits, or excess profits taxes, a like credit shall be allowed if such country allows a similar credit to citizens of the United States resident in such country."

The Conference Report on the Revenue Bill of 1918 (H. R. Rep. No. 1037, 65th Cong., 3d sess., p. 53), contains the following statement: "Amendment No. 118: The House bill provided that a citizen of the United States might credit against his income tax the amount of any income, war-profits, and excess-profits taxes paid to any foreign country, Porto Rico, or the Philippine Islands, upon income derived from sources therein, and allowed a similar credit to an alien resident if his country makes reciprocal provisions. The Senate amendment entirely rewrites the section and broadens it to include a credit for taxes paid to any possession of the United States, which is also [illegible]e given to an alien resident of the United States. The House recedes [illegible]n amendment providing that if any deduction is allowed for taxes [illegible]l in any possession or foreign country, the commissioner may require the taxpayer to give a surety bond providing for the payment of any tax found to be due the Government in case too great a deduction shall be allowed for accrued taxes in our possessions or any foreign country. . . ."

its income tax here upon dividends received from its foreign subsidiary, of a proportionate part, as defined, of the income taxes paid by that subsidiary to "any foreign country."[7] The same provision applies to subsidiaries with respect to income taxes paid "to any possession of the United States."

In effectuating these purposes, it is manifest that the controlling consideration was the fact that the income tax was paid to a foreign government competent to lay the tax, and not the international status of that government. The burden upon the domestic corporation was the same whether the foreign government had international standing or was a lesser political entity which nevertheless had authority to impose the exaction upon the corporation or its subsidiary. And if credit was to be allowed here by reason of the payment of the income tax abroad, it made no difference to the Government of the United States whether the payment abroad was made to the one sort of foreign government or the other. The reasons underlying the allowance of the credit were applicable in either case.

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[7] In the Report of the Committee on Ways and Means of the House of Representatives in relation to the Revenue Bill of 1921 (H. R. Rep. No. 350, 67th Cong., 1st sess., p. 8), the following statement was made with respect to American concerns doing business in foreign countries: "Under existing law an American citizen or domestic corporation is taxed upon his or its entire income even though all of it is derived from business transacted without the United States. This results in double taxation, places American business concerns at a serious disadvantage in the competitive struggle for foreign trade, and encourages American corporations doing business in foreign countries to surrender their American charters and incorporate under the laws of foreign countries." While this statement was made to introduce a remedial proposal, which was not adopted, it discloses the purpose entertained. See, also, Report of Committee of Finance of the Senate (Sen. Rep. No. 275, 67th Cong., 1st Sess., p. 9).

The Conference Report on the Revenue Bill of 1921 (H. R. Rep. 486, 67th Cong., 1st sess., p. 38), contains the following: "Amendment No. 436: The House bill provided for the exclusion from income of all dividends received from a corporation. Senate amendments agreed to by the conferees having provided for the inclusion in gross income of certain dividends received from a foreign corporation, Senate amendment No. 436 provides, under proper safeguards, for the credit by a domestic corporation of taxes paid by its subsidiary foreign corporation with respect to the income or profits of the foreign corporation paid as taxable dividends to the domestic corporation, and the House recedes."

An examination of the provisions of earlier income tax acts in which the expression 'foreign country' is found, does not support, but rather negatives, the conclusion that the term was used in the restricted sense for which the petitioner contends. In the Corporation Tax Act of 1909 (36 Stat. 113) deduction from gross income was allowed to the corporation for all sums paid by it within the year for taxes "imposed by the government of any foreign country as a condition to carrying on business therein." That corporation tax was an excise on the privilege of doing business in a corporate capacity. The provision with respect to taxes laid by a foreign government manifestly referred to that government which, as the statute said, imposed a privilege tax. There was no suggestion that the foreign government laying the tax must have an international status; it was enough that it had authority to require the payment "as a condition to carrying on business". In the Income Tax Act of 1913, Paragraph G (b) (38 Stat. 173) deduction was allowed, in computing net income of a corporation, of "all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the Government of any foreign country." The Income Tax Act of 1916, Sections 5 (a), 6 (a) and 12 (a) (39 Stat. 759, 769), provided for deduction from gross income of "Taxes paid within the year imposed by the authority of the United States, or its Territories, or possessions, or any foreign country, or under the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits." The Income Tax Amendments of 1917, Sections 1201 (1), 1207 (1) (40 Stat. 330, 335) continued the provisions for deductions as to taxes imposed "by the authority" of "any foreign country" in obviously the same sense.[3]

There appears to be no room for the conclusion that, under these Acts, the deductions for taxes paid abroad were available only if paid to a foreign government that had an international

[3]These provisions in the Act of 1917 read: "Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes), or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits."

standing, and not if paid to a foreign government which although not having that standing was still authorized to exact the taxes. The criterion was the fact that the tax was imposed by the authority of a foreign country and not the international status of the particular government to which it was paid. We have not been referred to any opposing administrative construction of these Acts.[9]

The Revenue Act of 1918, with its provisions for credits, against income taxes laid here, of taxes paid "to any foreign country, upon income derived from sources therein" (Secs. 222 (a), 238 (a); 40 Stat. 1073, 1080)[10], was enacted with this background and we

[9]On the contrary, Treasury Regulations No. 33, Revised (issued in January, 1918, applicable to the Income Tax Acts of 1916 and 1917) had the following provision in Article 8 with respect to the deductions allowed to citizens and resident aliens for taxes paid abroad: "Taxes: State or any political subdivision thereof, Federal or foreign (except income and excess profits taxes paid to the United States), and not including taxes assessed against local benefits."

The provision of these regulations as to the taxes deductible in cases of corporations, had the same import.

This provision was as follows: "Art. 191. *Taxes deductible.*—Taxes imposed against a corporation by authority of the United States (except income and excess-profits taxes) its territories or any foreign country, or by authority of any State, county, school district, municipality, or other taxing subdivision of a State (not including those assessed against local benefits) and paid within the year for which the return is made, are deductible from the gross income of a domestic corporation."

[10]These provisions as to individuals were as follows:

"Sec. 222 (a). That the tax computed under Part II of this title shall be credited with:

"(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States; and

"(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

"(3) In the case of an alien resident of the United States who is a citizen or subject of a foreign country, the amount of any such taxes paid during the taxable year to such country, upon income derived from sources therein, if such country, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; . . ."

And with respect to domestic corporations:

find no basis whatever for the conclusion that the term "foreign country" was used in that statute in any different sense. In the Act of 1918, the provisions for deductions of taxes from gross income, in computing net income, by citizens or residents, and by domestic corporations, of taxes paid to a foreign country, were continued as in the prior acts, save that there was excepted from these deductions the amount of the credits now allowed to citizens and residents under section 222 and to domestic corporations under section 238 (40 Stat. 1067).[11] In these provisions for deductions, the expression "foreign country" undoubtedly had the same meaning that it had in the prior income tax acts.[12] It will be observed that taxes paid to the States of the Union, or to their political subdivisions, were deductible from gross income.[13] But in the provisions introduced in the Act of 1918 for credits against income

"Sec. 238 (a). That in the case of a domestic corporation the total taxes imposed for the taxable year by this title and by Title III shall be credited with the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States. . . ."

[11]These provisions for deductions in the Revenue Act of 1918 were: "Sec. 214 (a) . . . (3). Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (c) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed; or (d) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; . . ."

Section 234 (a) (3) (d) provided for a similar deduction of taxes paid by a domestic corporation, excepting from such deductions the credits allowed under section 238.

[12]Treasury Regulations No. 45, under the Revenue Act of 1918, thus described these deductions: "Art. 131. *Taxes.*—Federal taxes (except income, war profits and excess profits taxes), State and local taxes (except taxes assessed against local benefits of a kind tending to increase the value of the property assessed), and taxes imposed by possessions of the United States or by foreign countries (except the amount of income, war profits and excess profits taxes allowed as a credit against the tax), are deductible from gross income. . . ." See, *supra*, note 9.

[13]*Supra*, note 11.

taxes, such taxes paid to the States of the Union, and to their political subdivisions, were not included.[14] This fact does not affect the present question, for credits were allowed in the case of income taxes paid to foreign countries, and the provision as to such countries was the same in the section relating to credits as in that with respect to deductions. The slight difference in phraseology in sections 222 and 238 as to credits for taxes paid "*to* any foreign country", instead of taxes imposed "*by the authority of* any foreign country", as in sections 214 (a) and 234 (a)[15] is not important. As the context plainly shows, both phrases were intended to convey the same meaning. Thus section 234 (a) (3) (d) provides for deduction, in computing the net income of a domestic corporation, of the taxes imposed "by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 238." The distinction made with respect to income taxes paid to the States of the Union, and to their political subdivisions, between deductions from gross income and credits against taxes, simply reflected the economic policy adopted in making allowances for taxes paid within the borders of continental United States and the organized territories. In relation to income taxes paid outside these borders, the provision as to credits was enacted to give greater and not less relief. Not only was the same expression as to foreign countries used in the section as to credits against income taxes as had been employed, and was still continued, as to deductions from gross income, but that the reference was not to a government having an international status was indicated by the provision for similar credits in cases of income taxes paid to "any possession of the United States."[16] And that the dominant thought in the mind of the Congress was to allow a credit for income taxes paid in any foreign country, whenever imposed by the authority of a foreign government, is shown in the reports, above cited, of the committees in connection with the Revenue Bill of 1918.[17]

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[14] *Supra*, note 10.

[15] *Supra*, note 11.

[16] See sections 222 (a) and 238 (a) of the Revenue Act of 1918; *supra*, note 10.

[17] *Supra*, note 6.

No change, or qualification, was made in the use of the term "foreign country" in the Revenue Act of 1921,[18] and we think it must be regarded as having the same significance as it unquestionably had through the series of the prior income tax acts to which we have referred. The same controlling purpose is manifest, and the credit provision, here in question, in relation to taxable dividends from foreign subsidiaries of domestic corporations was introduced not to narrow that purpose but to carry it out more effectively.[19]

The present controversy has arisen under the Treasury Regulations adopted with respect to the Revenue Acts of 1918 and 1921 as to credits.[20] The familiar principle is invoked that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration. *United States* v. *Jackson*, 280 U. S. 183, 193. But the qualification of that principle is as well established as the principle itself. The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons. *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 280. See, also, *United States* v. *Dickson*, 15 Pet. 141, 161; *United States* v. *Healey*, 160 U. S. 136, 145; *Chicago, Milwaukee & St. Paul Rwy. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 94, 99. Moreover, ambiguous regulations are of little value in resolving statutory ambiguities. In the 'Preliminary Edition' of Treasury Regulations No. 45 under the Act of 1918, Article 382 relating to credits stated: "'Foreign country' means any governmental authority, not that of the United States or any part or possession thereof, having power to impose such taxes, and it therefore includes a self-governing colony, such as the Dominion of Canada." But this provision was shortly superseded in the amended Regulations No. 45, promulgated April 17, 1919, by a new Article 382 containing the following: "'Foreign country' includes within

[18]Supra, notes 1 and 5.

[19]See reports of committees in relation to the Revenue Bill of 1921, *supra*, note 7.

[20]So far as deductions of taxes from gross income, in computing net income, are concerned, the regulation under the Act of 1918 was continued under that of 1921. Treasury Regulations No. 62, Art. 131; see, *supra*, note 12.

its meaning any foreign sovereign state or self-governing colony (for example, the Dominion of Canada), but does not include a foreign municipality (for example, Montreal) unless itself a sovereign State (for example, Hamburg). 'Any possession of the United States' includes, among others, Porto Rica, the Philippines and the Virgin Islands.'' The Department thus sought to introduce a qualification as to the significance of 'foreign country' not found in the words of the statute, or in those of the preceding income tax acts, or in departmental regulations under them, and one that was inconsistent with the apparent purpose of the enactment. It was a qualification which not only did not conform to the view that the expression 'foreign country' was limited to a foreign State having the status of an international person under international law, but, on the other hand, afforded no definite criterion. Its phrase 'self-governing colony' had no certain application, as there are colonies with varying degrees of self-government, and if, in view of the aim of the statute, it was important to draw a distinction with respect to self-government, it would appear that the particular phase of autonomy that was relevant to the purpose of the statute was the competency to impose income taxes upon the domestic corporation, or its foreign subsidiary, with respect to which the relief was granted. It is true that certain foreign political divisions which formerly had not had an international status were achieving it, but even that progress, at the time of the adoption of the regulation in 1919,[21] was still uncertain both as to the quality and extent of the international recognition which would be accorded, and, however important in other relations that progress might be, it was not the concern of this statute and its operation cannot be deemed to depend upon it. The departmental regulation became the more ambiguous as it proceeded with its illustrations relating to municipalities.

By section 216 (e) of the Revenue Act of 1918, a non-resident alien individual was allowed credits for personal exemptions and for dependents if the 'country' of which he was a citizen or subject allowed a similar credit to citizens of the United States not residing in 'such country.' Article 307 of Regulations No. 45 gave a list of 'countries' which satisfied the credit requirements of this provision. This list was amended in later editions of these

[21] See Oppenheim, International Law, 4th ed., vol. 1, secs. 63, 94*a*, 94*b*.

regulations, applicable to the Revenue Act of 1918, and embraced a great variety of 'countries,' including, for example, British Honduras, Ceylon, Cyprus, Fiji Islands, Gibraltar, Gold Coast, Malay States, Mauritius, St. Kitt-Nevis, etc.[22] As already noted, the expression 'foreign country' was used in section 222 (a) (3) of

[22]See Article 307, Treasury Decisions, vol. 21, p. 245; vol. 23, p. 444; vol. 24, p. 118. As finally amended, the Article was as follows:

"Art. 307. *When nonresident alien individual entitled to personal exemption.*—(a) The following is an incomplete list of countries which either impose no income tax or in imposing an income tax allow both a personal exemption and a credit for dependents which satisfy the similar credit requirement of the statute: Argentina, Bahama, Barbados, Basutoland, Bechuanaland Protectorate, Belgium, Bermuda, Bolivia, Bosnia, Brazil, British Guiana, British Honduras, Bukowina, Bulgaria, Canada, Carniola, Ceylon, Chile, China, Colombia, Cuba, Cyprus, Czechoslovakia, including Bohemia, Moravia, and Slovakia, Dalmatia, Denmark, Ecuador, Egypt, Falkland Islands, Fiji Islands, France, Galicia, Gambia, Germany, Gibralter, Gold Coast, Goritz, Gradisca, Greece, Grenada, Guatemala, Herzegovina, Hongkong, Istria, Jamaica, Kenya, Luxemburg, Malay States, Malta, Mauritius, Mexico, Montenegro, Montserrat, Morocco, Newfoundland, Nicaragua, Nigeria, Northern Rhodesia, Norway, Nyasaland Protectorate, Panama, Paraguay, Persia, Peru, Porto Rico, Portugal, Rumania, St. Kitt-Nevis, St. Helena, Santo Domingo, Serbia, Siam, Sierra Leone, Silesia, Somaliland Protectorate, Spain, Swaziland, Switzerland, Trieste, Uganda Protectorate, Union of South Africa, Venezuela, Virgin Islands (British), Weihaiwei, Western Pacific Islands, Zanzibar Protectorate. (b) The following is an incomplete list of countries which in imposing an income tax allow a personal exemption which satisfies the similar credit requirement of the statute, but do not allow a credit for dependents: Bachka, Banat of Temesvar, Croatia, Finland, India, Italy, Salvador, Slavonia, Transylvania. (c) The following is an incomplete list of countries which in imposing an income tax do not allow to citizens of the United States not residing in such country either a personal exemption or a credit for dependents and therefore fail entirely to satisfy the similar credit requirements of the statute: Australia, Austria, including Carinthia, Lower Austria, Salzberg, Styria, Tyrol, Upper Austria and Vienna, Costa Rica, Dutch Guiana, Great Britain and Ireland, Japan, the Netherlands, New Zealand, Trinidad, Sweden. The former names of certain of these territories are here used for convenience, in spite of an actual or possible change in name or sovereignty. A nonresident alien individual who is a citizen or subject of any country in the first list is entitled for the purpose of the normal tax to such credit for personal exemption and for dependents as his family status may warrant. If he is a citizen or subject of any country in the second list he is entitled to a credit for personal exemption, but to none for dependents. If he is a citizen or subject of any country in the third list he is not entitled to credit for either personal exemption or for dependents. If

the Revenue Act of 1918 in relation to credits allowed to an alien resident of the United States for taxes upon income derived from sources in such 'country,' if the latter allowed a similar credit to citizens of the United States.[23] Article 385 of Regulations No. 45, set forth the list of 'countries' which did or did not satisfy this reciprocal credit requirement. This Article further illustrates the ambiguity of the regulations.[24]

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he is a citizen or subject of a country which is in none of the lists, then to secure credit for either a personal exemption or for dependents he must prove to the satisfaction of the commissioner that his country does not impose an income tax or that in imposing an income tax it grants the similar credit required by the statute.''

[23] *Supra*, note 10.

[24] Article 385 of Regulations No. 45 is as follows (Treas. Decis. vol. 3, p. 473):

''Art. 385. *Countries which do or do not satisfy the similar credit requirement.*—(a) The following is an incomplete list of the countries which satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1918, either by allowing to citizens of the United States residing in such countries a credit for the amount of income, war profits, or excess profits taxes paid to the United States upon incomes derived from sources therein, or in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such countries: Bulgaria, Canada, Italy, Newfoundland, Salvador. (b) The following is an incomplete list of the countries which do not satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1918, either by allowing no credit to citizens of the United States residing in such countries, for the amount of income, war profits, or excess profits taxes paid to the United States upon incomes derived from sources therein, or because such countries do not impose any income, war profits, or excess profits taxes: Argentina, Bahama, Belgium, Bermuda, Bolivia, Bosnia, Brazil, Chile, China, Costa Rica, Ecuador, Egypt, Finland, France, Great Britain and Ireland, Guatemala, Herzegovina, India, Jamaica, Japan, Montenegro, Morocco, New Zealand, Nicaragua, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Santo Domingo, Serbia, Siam, Sweden, Switzerland, Venezuela. The former names of certain of these territories are here used for convenience in spite of the actual or possible change in the name or sovereignty. A resident of the United States who is a citizen or subject of any country in the first list is entitled, for the purpose of the total tax due the United States for 1918 and subsequent years, to a credit for the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to such country upon income from sources therein. If he is a citizen or subject of any country in the second list, he is not entitled to such credit. If he is a citizen or subject of a country which is in neither list, then to secure the desired credit he must prove to the satisfaction of the Commissioner that his country satisfies the similar credit requirement of the statute.''

It is urged that the Revenue Act of 1921 must be deemed to have been adopted with the meaning attributed to the term 'foreign country' by the regulations under the Act of 1918. But regulations of such an ambiguous character supplying no definite criterion cannot be deemed to determine satisfactorily the interpretation of the statute. The Revenue Act of 1918 had continued the expression 'foreign country' precisely as it had been used in the preceding income tax acts without any such restricting gloss, and the Act of 1921 continued the expression as used in the Act of 1918. In these circumstances, we are of the opinion that the expression 'foreign country' in the Act of 1921 should be deemed to have the same significance in that Act that it had in the prior acts and was not limited by the regulations adopted under the Act of 1918. The regulations under the Act of 1921 were of the same equivocal sort as those to which we have referred under the Act of 1918, and can be deemed to have no greater effect.[25] The decisions of the Treasury Department[26] applying these regulations have no more force than the reasons given to sustain them and these, in our opinion, furnish no adequate ground for denying effect to the credit provisions of the statute in accordance with their manifest purpose.

In this view, we find it unnecessary to consider the arguments that have been adduced with respect to the status of New South Wales in its relation to the Commonwealth of Australia. There is no question that New South Wales levied the income taxes for which credit is sought and that its government had adequate authority to impose them.

We conclude that the Board of Tax Appeals and the Circuit Court of Appeals were right in holding that these income taxes fell within the statutory provision as to credits, and the judgment is affirmed.

Judgment affirmed.

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[25]Regulations No. 62, Articles 382, 385.

[26]Solicitor's Memorandum No. 1187, October 18, 1919; Office Decision No. 1050, C. B. 5, p. 194, Solicitor's Memorandum No. 1614, C. B. III-1, p. 227.